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No. 94-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

RONALD E. MARTINDALE, U.S. NAVY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

CAN A WITNESS BE UNAVAILABLE FOR HEARSAY PURPOSES, BUT AVAILABLE FOR CONFRONTATION PURPOSES?

CAN A COURT CONSIDER CORROBORATING EVIDENCE IN DETERMINING THE RELIABILITY OF A HEARSAY STATEMENT UNDER A RESIDUAL EXCEPTION TO THE HEARSAY RULE WHEN CONFRONTATION IS NOT AT ISSUE?

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT

I. A WITNESS CANNOT BE UNAVAILABLE FOR HEARSAY PURPOSES, BUT AVAILABLE FOR CONFRONTATION PURPOSES. 5

II. A COURT SHOULD NOT CONSIDER CORROBORATING EVIDENCE IN DETERMINING THE RELIABILITY OF A HEARSAY STATEMENT UNDER A RESIDUAL EXCEPTION TO THE HEARSAY RULE WHEN CONFRONTATION IS NOT AT ISSUE. ... 15

CONCLUSION 20

APPENDIX A (Opinion of the U.S Court of Military Appeals) 1a

APPENDIX B (Opinion of the U.S. Navy-Marine Corps Court of Military Review) 6a

APPENDIX C (Order of the U.S Court of Military Appeals) 33a

APPENDIX D (Opinion of the U.S Court of Military Appeals) 35a

APPENDIX E (Opinion of the U.S. Navy-Marine Corps Court of Military Review) 51a

APPENDIX F (Order of the U.S Court of Military Appeals) 56a

APPENDIX E (Opinion of the U.S. Navy-Marine Corps Court of Military Review) 57a

TABLE OF AUTHORITIES

Cases:

California v. Green, 399 U.S. 149 (1970) 8
Coy v. Iowa, 487 U.S. 1011 (1988) 8
Doe v. United States, 976 F.2d 1071 (7th Cir. 1992) . 16
Douglas v. United States, 380 U.S. 414 (1965) 12
Huff v. White Motor Corp., 609 F.2d 286 (7th Cir 1979) 16
Idaho v. Wright, 497 U.S. 805 (1990) . . . . . passim
Mattox v. United States, 156 U.S. 237 (1895) 8
Ohio V. Roberts, 448 U.S. 56 (1980) 7
Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 7
United States v. Fensterer, 474 U.S. 15 (1985) 11
United States v. Inadi, 475 U.S. 387 (1986) . . . 12, 13
United States v. Owens, 484 U.S. 554 (1988) . . . 9, 12
United States v. Valdez-Soto, 31 F.3d 1467 (9th Cir. 1994) 16

White v. Illinois, 112 S.Ct. 736 (1992) 9, 12
United States v. Martindale, 30 M.J. 172 (C.M.A. 1990) 2, 3, 9
United States v. Martindale, 36 M.J. 870 (N.M.C.M.R. 1993) . . . . . passim
United States v. Martindale, 40 M.J. ___ (C.M.A. 1994) . . . . . passim

Constitutional Provisions:

U.S. Constitution, amendment V . . . . . passim
U.S. Constitution, amendment VI . . . . . passim

Statutes and Rules:

Article 125, U.C.M.J., 10 U.S.C. § 925 5
Article 134, U.C.M.J., 10 U.S.C. § 934 5
Article 80, U.C.M.J., 10 U.S.C. § 880 5
Military Rule of Evidence 803 . . . . . passim
Military rule of Evidence 804 . . . . . passim
Title 28 U.S.C. § 1259(3) 2

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OPINIONS BELOW

The September 15, 1994 opinion of the United States Court of Military Appeals [hereinafter the C.M.A.][1], *United States v. Martindale*, 40 M.J. ___, (C.M.A. 1994), is reprinted as Appendix A.

The January 11, 1993 opinion of the Navy-Marine Corps Court of Military Review [hereinafter the

[1] The United States Court of Military Appeals has been renamed the United States Court of Appeals for the Armed Forces. All cases relevant to this petition were decided before the name change, so the original name of the court is used in this petition.

N.M.C.M.R.][2], *United States v. Martindale*, 36 M.J. 870 (N.M.C.M.R. 1993), is reprinted as Appendix B.

The September 19, 1990 order setting aside the July 12, 1990 decision of the C.M.A. and the January 6, 1989 decision of the N.M.C.M.R., and remanding the case to the N.M.C.M.R. for reconsideration, *United States v. Martindale*, 32 M.J. 33 (C.M.A. 1990) (summary disposition), is reprinted as Appendix C.

The July 12, 1990 decision of the C.M.A., *United States v. Martindale*, 30 M.J. 172 (C.M.A. 1990), is reprinted as Appendix D.

The January 6, 1989 decision of the N.M.C.M.R., *United States v. Martindale*, No. 85 0771R (N.M.C.M.R. January 6, 1989), is reprinted as Appendix E.

The June 16, 1987 order setting aside the December 30, 1985 decision of the N.M.C.M.R., and remanding the case for reconsideration, *United States v. Martindale*, 24 M.J. 405 (C.M.A. 1987) (summary disposition), is reprinted as Appendix F.

The December 30, 1985 decision of the N.M.C.M.R., *United States v. Martindale*, No. 85-0771 (N.M.C.M.R. Dec. 30, 1985), is reprinted as Appendix G.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on September 16, 1994. Title 28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision.

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[2] The Navy-Marine Corps Court of Military review has been renamed the Navy-Marine Corps Court of Criminal Appeals. All cases relevant to this petition were decided before the name change, so the original name of the court is used in this petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property without due process of law.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

STATEMENT OF THE CASE[3]

While attending a meeting of Overeaters Anonymous, petitioner told his counselor that he had sexually abused his 12 year old son. Petitioner subsequently gave a confession to agents of the Naval Investigative Service [hereinafter N.I.S.], the criminal investigative agency of the U.S. Navy.

As a result of petitioner's statements, petitioner's son, Sean, was interviewed for two hours by N.I.S. agents, who tape recorded the interview. A transcript of the tape recorded interview was prepared. This transcript was the only evidence which corroborated petitioner's confession.

The government offered the transcript into evidence at trial. The defense objected. An evidentiary hearing was held, and Sean testified. Sean stated that he did not remember any of the alleged incidents with his father and

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[3] This statement of the case is drawn from *United States v. Martindale*, 36 M.J. 870 (N.M.C.M.R. 1993), *citing United States v. Martindale*, 30 M.J. 172 (C.M.A. 1990), *vacated, United States v. Martindale*, 32 M.J. 33 (C.M.A. 1990) (summary disposition).

that he was not sure what he had told the N.I.S. Agents during the interview. He also testified that he "just made up things" during the interview, and that "it's a lie - what they said."

At the end of the evidentiary hearing, the government sought to have Sean declared unavailable and offered his statement to the N.I.S. agents under the residual hearsay exception of Military Rule of Evidence [hereinafter Mil. R. Evid.] 804(b)(5).[4] The defense requested that the declarant be declared available, that the government be required to call the declarant on the merits, and that the hearsay statement be suppressed as unreliable.

The military judge found that Sean was unavailable as a witness due to his failed memory and a perceived refusal to testify. The military judge ruled that Sean's recorded interview was admissible under either of the residual hearsay provisions of the Military Rules of Evidence; 803(24) or 804(b)(5). The trial judge did not state which guarantees of trustworthiness he found that made this evidence admissible as residual hearsay.

The judge, after declaring the declarant unavailable for hearsay purposes, then stated that the declarant was available for confrontation purposes. The judge stated that if the defendant wished to cross-examine the declarant the court would require the government to call the declarant, and although the government would not ask the declarant any questions the petitioner's right to cross-examine the

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[4] References to the rules of evidence in this petition are to the Military Rules of Evidence. All of the Military Rules of Evidence relevant to petitioner's case, however, are identical to the corresponding Federal Rules of Evidence, as they are required to be absent specific action by the President. *See* Article 36, Uniform Code of Military Justice, Manual for Courts-Martial, 1984 [hereinafter U.C.M.J.], 10 U.S.C. § 836. Therefore, the issue presented in this petition is also applicable to federal civilian practice.

declarant would not be limited in any way. The defense did not elect to cross-examine Sean. Petitioner's confession was also admitted into evidence.

Petitioner, contrary to his pleas, was found guilty of one specification of attempted sodomy in violation of Article 80, U.C.M.J., 10 U.S.C. § 880, one specification of committing an indecent act with a minor in violation of Article 134, U.C.M.J., 10 U.S.C. § 934, and thirteen specifications of sodomy in violation of Article 125, U.C.M.J., 10 U.S.C. § 925. The only evidence against petitioner was the transcript of Sean's interview and petitioner's confession.

Petitioner was sentenced to five years of confinement, a dishonorable discharge, and reduction to pay grade E-1.

REASONS FOR GRANTING THE WRIT

A WITNESS CANNOT BE UNAVAILABLE FOR HEARSAY PURPOSES, BUT AVAILABLE FOR CONFRONTATION PURPOSES.

The court below found that Sean, the only witness against petitioner, was unavailable for hearsay purposes but available for confrontation. In doing so, the court ignored the plain meaning of both the rules of evidence and the Sixth Amendment. The holding violated petitioner's Sixth Amendment right to confrontation, and his Fifth Amendment right to due process. The holding has redefined the meaning of availability in such a way that a defendant can now be convicted based on what would otherwise be inadmissible hearsay, without ever having a meaningful opportunity to face the witnesses against him.

The court below affirmed the trial court's ruling that because Sean either did not remember the events in

question, or was unwilling to testify as to those events, he was unavailable within the meaning of Mil. R. Evid. 804(a)(2) and 804(a)(3). Appendix A [hereinafter *Martindale II*] at 2a (*citing United States v. Martindale*, 36 M.J. 870, 880-81 (N.M.C.M.R. 1993) [hereinafter *Martindale I*]). For the same reasons the court agreed that the hearsay statement to N.I.S. was the most probative evidence available, and was admissible under Mil. R. Evid. 804(b)(5). *Martindale II* at 3a (*citing United States v. McGrath*, 39 M.J. 158, 166-67 (C.M.A. 1994), *cert. denied* 63 U.S.L.W. 3340 (U.S. October 31, 1994) (No. 94-190); *Martindale I* at 880-81). Additionally, the court ruled that because Sean was physically present at trial and subject to cross-examination, petitioner was provided with confrontation. *Id.* at 3a (*citing Martindale I* at 875). Finally, the court held that because Sean was available for cross-examination, the statement did not itself have to be sufficiently reliable to satisfy confrontation, so *Idaho v. Wright*, 487 U.S. 805, 814-15 (1990), did not apply.[5] *Id.* at 2a (*citing McGrath*, 39 M.J. at 163-67;3 *Martindale I* at 873-81).[6]

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[5] The court took pains to find that *Wright* did not apply, because had it applied, the statement would have been inadmissible. *See Martindale II* at 4a-5a (Wiss, J., dissenting); *Martindale I* at 881 (four of eight factors court looked to to find statement admissible violated *Wright*); *Martindale*, 30 M.J. 176 (Everett, C.J., dissenting).

[6] The court also seemed to believe that the statement would have been admissible under Mil. R. Evid. 803(24). This was a mistaken belief based on the fact that for most purposes Mil. R. Evid. 803(24) and Mil. R. Evid. 804(b)(5) are identical. The mistake was that while both residual exceptions apply the same test for admissibility, under Mil. R. Evid. 803(24) the declarant could be available, so the hearsay must be more probative than testimony which an available witness could provide. If Sean had been available to testify, however, the hearsay statement most

The lower court's holding is based on this Court's precedents stating that a different inquiry into the admissibility of a hearsay statement applies when hearsay must also satisfy confrontation. *Ohio V. Roberts*, 448 U.S. 56 (1980); *Idaho v. Wright*, 497 U.S. 805 (1990). The court below took this Court's holdings regarding confrontation and hearsay one step further, and ruled that the inquiry into the availability of a witness can also vary depending on whether the availability is for hearsay or confrontation. *Martindale II*, 2a-3a (*citing McGrath*, 39 M.J. at 161-67; *Martindale I* at 873-81 (both cases holding that a witness can be unavailable for hearsay purposes and available for confrontation)). The court held that Sean was unavailable for hearsay purposes, but available for confrontation. *Id.* Petitioner, however, does not believe that this Court intended its cases to mean that a witness can be unavailable and available simultaneously. Such an application, as petitioner's own case demonstrates, permits an analysis which denies a defendant basic constitutional rights, and circumvents the rules of evidence.

I. The confrontation problem: direct examination.

This Court has stated that "[t]he Confrontation Clause provides two types of protection for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (plurality opinion). Indeed, this Court wrote almost 100 years ago that:

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likely would not have been the most probative evidence available, rather the live testimony would have been. It was only because Sean was unavailable under Mil. R. Evid. 804 that the hearsay became the most probative evidence available.

> The primary object of [the Sixth Amendment] was. . . a personal examination . . . of the witness, in which the accused has an opportunity . . . of compelling him to stand face to face with the jury in order that they may look at him, and judge by . . . the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-243 (1895). The plain meaning of the Confrontation Clause is the right of a defendant to confront face-to-face the witnesses against him. *California v. Green*, 399 U.S. 149, 155 (1970) ("Our own decisions seem to have recognized at an early date that it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause."); *Coy v. Iowa*, 487 U.S. 1011, 1021 (1988) ("The irreducible literal meaning of the Clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*.'" (citation omitted)).

In a case with an unavailable declarant, the defendant will never have the opportunity for face-to-face confrontation with the witness against him. Indeed, it is impossible to confront that witness face-to-face, because the plain meaning of a witness being unavailable is that the witness does not testify. By definition, that witness cannot testify. That is why the witness is unavailable. A non-testifying witness cannot possibly provide confrontation, because there can be no confrontation with a witness who does not testify. It is contrary to the plain meaning of both the Sixth Amendment and the rules of evidence for a court to conclude that a witness can be unavailable to testify but still provide a defendant with confrontation.

Petitioner's case illustrates this lack of confrontation. In the view of the lower court, the only

testimony Sean could have given, either on direct or cross examination, was that he did not remember the incidents that petitioner was charged with, and that he did not remember the interview with N.I.S. *Martindale II at 874-75.* In short, had Sean taken the stand at any time on the merits, he would simply have proven that he was unavailable. Testifying as to this lack of memory would not have made Sean a witness against petitioner. *See White v. Illinois*, 112 S.Ct. 736, 745 (1992) ("As applied in the Sixth Amendment context of a prosection, the noun 'witness' . . . [means] 'one who gives testimony,' *i.e.* '[i]n *judicial proceedings*, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court.'" (citation omitted) (Thomas, J., and Scalia, J., concurring in part and concurring in the judgement)). The fact that Sean could not or would not remember the events in question was not what convicted petitioner. Petitioner was convicted based on what Sean had allegedly remembered when he spoke to N.I.S, rather than on what he did not remember at trial. *Martindale I* at 873 (*citing United States v. Martindale*, 30 M.J. 172, 173 (C.M.A. 1990), *vacated United States v. Martindale*, 32 M.J. 33 (C.M.A. 1990) (summary disposition)). Thus, for the very reason that Sean was found to be unavailable, such testimony as he could have given would not have provided petitioner with face-to-face confrontation.

The only way petitioner could have been afforded actual face-to-face confrontation at trial was for Sean to testify about the incidents in question, or at least about the hearsay statement. Had Sean remembered the alleged incidents, and testified to them, then there would have been confrontation. Had he not remembered the incidents, but remembered and adopted the hearsay statement, then perhaps there would have been confrontation. *See United*

States v. Owens, 484 U.S. 554 (1988) (admission of non-hearsay statement of witness identifying attacker, and testimony of same witness, who no longer remembered identity of attacker but remembered identifying attacker previously, satisfied confrontation). Since Sean neither remembered the incidents, nor remembered the hearsay statement, there could never be confrontation.

II. The confrontation problem: cross-examination.

Further, it is doubtful that an unavailable witness can satisfy a defendant's right to cross-examination. There is no opportunity for effective cross-examination of a witness who is unavailable because he cannot or will not remember the events in question. Again, unlike in *Owens*, where the witness in effect adopted the statement (and where the statement was not hearsay to begin with), in petitioner's case cross-examination on the contents of the statement was impossible. The witness simply could not or would not remember either the events alleged in the statement or the making of the statement itself. Thus, the only cross-examination available to petitioner would have been the exact statements which rendered the witness unavailable: "I don't remember." It is unreasonable to believe that cross-examination of an unavailable declarant, which results in statements which define the declarant's unavailability, is in fact cross-examination.

If cross-examination of a declarant who is unavailable due to lack of memory satisfies confrontation, then the mere opportunity to cross-examine an insane declarant would also satisfy confrontation. Under Mil. R. Evid. 804(a)(4), such a declarant would be unavailable for hearsay purposes, and a hearsay statement of that witness would be admissible under Mil. R. Evid. 804(b)(5). In such a case, the declarant would be physically present, and able to answer questions, but the answers would make no

sense. Based on the lower court's logic in petitioner's case, despite the fact that the witness is unavailable because he is insane, that very same insane witness is available for confrontation purposes. Further, because the insane witness can and will answer questions, the defendant's right to confrontation has been satisfied -- the right is for the opportunity of effective cross-examination, not effective cross-examination.

The opportunity to cross-examine an insane declarant, however, or one who is unavailable for another reason, does not satisfy confrontation. A decision that the opportunity to cross-examine an unavailable declarant satisfies the Sixth Amendment is a decision that places form over substance. It is a decision that creates a system in which a meaningless opportunity has swallowed up the intent of the constitutional right. Such a system has "effectively . . . emasculate[d] the right [to] confrontation itself." *See United States v. Fensterer*, 474 U.S. 15, 19 (1985) (*per curiam*). Such a system has now been created by the lower court.

III. The due process problem: shifting the burden.

Additionally, a system which finds that confrontation has been satisfied by the opportunity to cross-examine an unavailable witness also denies a defendant due process. It is a fundamental principle of our criminal justice system that the defendant need do nothing, because the government has the burden of proving him guilty, rather than the defendant having the burden of proving his innocence. The lower court, however, in ruling that the opportunity to cross-examine an unavailable witness on a hearsay statement satisfied confrontation, ignored that basic principle. Even assuming that such an opportunity does satisfy confrontation, a defendant must first know what the declarant's position is on that

statement. *See e.g. Douglas v. United States*, 380 U.S. 414, 420 (1965) ("[e]ffective confrontation of [a hearsay declarant] was possible only if [the declarant first] affirmed the statement as his.").

As in any case, there must first be direct testimony before there can be cross-examination. *See White*, 112 S.Ct. at 745 (Thomas, J., and Scalia, J., concurring in part and concurring in the judgement). The defendant must know whether the witness is now saying, at trial, that the events alleged in the statement are true, before he can conduct cross-examination. If the witness adopts the statement, then the contents of the statement have become evidence. *See Owens*, 484 U.S. at 554. But it is only the government, not the defendant, that wants the contents of the statement to be evidence. In creating the system which it did, the lower court placed on a defendant the burden of asking the government's questions for it, as well as asking cross-examination questions for himself.

If the witness denies the statement, then the statement was not admissible in the first place, because then it was simply an inadmissible prior inconsistent statement. If the witness refuses to answer questions, or claims a lack of memory, then there is still no testimony on which to conduct cross-examination. Regardless of how the declarant testifies, the defendant will still have been required to conduct the direct examination for the government. This is an impermissible shifting of the burden. It requires a criminal defendant to take actions which the government would normally be responsible for; the direct examination of a government witness, before that defendant can exercise his constitutional right; the cross-examination of a government witness. *See e.g. United States v. Inadi*, 475 U.S. 387, 408-09 (1986) (Marshall, J., and Brennan, J., dissenting).

IV. The due process problem: equal access to witnesses.

Finally, the decision of the court below also violated petitioner's right to due process because it denied him equal access to the witness. The declarant was found unavailable to the government for hearsay purposes, so the government was allowed to use the hearsay statement. *Martindale I* at 877, 881. The declarant was found available to the defendant for cross-examination, so the hearsay statement in question was found to be admissible, despite the fact that it did not satisfy confrontation. *Martindale II* at 2a-3a. One of the reasons that a defendant is entitled to cross-examination, however, is the possibility that the witness may testify favorably for the defendant, or at least the possibility that the witness' testimony on cross-examination will lessen the impact of the testimony on direct. Thus, the court below ruled that Sean was unavailable to give testimony for the government, but available to give testimony for the defendant.

The problem with this holding is that both parties are entitled to equal access to witnesses and evidence. A situation should not arise were one party has access to testimony of a witness, and the other does not. *Inadi*, 475 U.S. at 408-09 (1986) (Marshall, J., and Brennan, J., dissenting). Usually, making a witness available for a defendant but unavailable for the government, while it would deny a defendant equal access, might not violate due process. In petitioner's case it did violate due process, because the evidence which petitioner had available to him was functionally meaningless. It was simply Sean's testimony that he did not remember the events in question. The government, on the other hand, by being "denied" access to Sean's in-court testimony, was in reality provided access to his hearsay statement, which it would not otherwise have had access to. Thus, by providing unequal

access to the two parties, the court below denied petitioner due process.

V. Waiver.

The lower court erred in finding that petitioner waived his right to confrontation by choosing not to cross-examine the unavailable declarant, *Martindale II* at 3a, for the same reasons that it erred in finding that a witness unavailable for hearsay purposes was available for confrontation. Before the opportunity to cross-examine even arose, petitioner had been denied his right to face-to-face confrontation. Further, the opportunity to cross-examine an unavailable declarant was a meaningless opportunity. Finally, in order to cross-examine the declarant, petitioner would first have had to conduct direct examination. The job of conducting direct examination of a government witness is not the defendant's burden, and cannot be imposed prior to a defendant's right to conduct cross-examination. Petitioner waived nothing when he chose not to cross-examine Sean.

Had the hearsay statement satisfied one of the enumerated exceptions to the hearsay rules, or if it had been admissible under a residual exception, then the right to confrontation would have been satisfied in petitioner's case. Mil. R. Evid. 803; Mil. R. Evid. 804; *Wright*, 487 U.S. at 821. The hearsay statement in question, however, was not admissible under an enumerated exception, and it did not possess sufficient indicia of reliability by virtue of its inherent trustworthiness to satisfy confrontation, so it was not admissible under a residual exception.

The only way that the government was going to be allowed to use the hearsay statement was if that statement was found to be admissible despite its lack of sufficient indicia of reliability. In order to find it admissible, the lower court was forced to violate the plain meaning of the

rules of evidence and the Sixth Amendment, violate petitioner's right to confrontation and due process, and circumvent the application of the rules of evidence. In making the hearsay statement in petitioner's case admissible, the lower court has created a new procedure by which a defendant can be convicted without ever being provided with confrontation.

The opinion of the lower court cannot stand. The lower court found support for its approach to availability in this Court's precedent. Thus, it is important that this Court address the issue of whether a witness can be unavailable for hearsay purposes, but available for confrontation purposes.

A COURT SHOULD NOT CONSIDER CORROBORATING EVIDENCE IN DETERMINING THE RELIABILITY OF A HEARSAY STATEMENT UNDER A RESIDUAL EXCEPTION TO THE HEARSAY RULE WHEN CONFRONTATION IS NOT AT ISSUE.

Prior to *Wright* "[m]ost federal courts [had] looked to the existence of corroborating evidence or the lack thereof to determine the reliability of hearsay statements not coming within one of the traditional hearsay exceptions." *Wright*, 497 U.S. at 829 (Kennedy, J., dissenting).

Wright established that when a party seeks to introduce a statement under a residual exception to the hearsay rule, constitutional concerns require the reliability of the hearsay statement to be determined solely by the circumstances surrounding the making of the statement. *Id.* at 822. The question remains, however, whether the *Wright* test for determining hearsay reliability is applicable when a

Confrontation Clause question does not exist.

The United States Court of Military Appeals and the United States Court of Appeals for the Ninth Circuit have both stated that once confrontation has been satisfied the test for reliability will not be limited to the circumstances surrounding the making of the hearsay statement, and reliability can be determined by the use of corroborating evidence. *See McGrath*, 39 M.J. at 165-66; *United States v. Valdez-Soto*, 31 F.3d 1467 (9th Cir. 1994).

The Ninth Circuit in *Valdez-Soto* found:

> In the absence of concerns about the accused's right to confrontation, the trial judge has a fair degree of latitude in deciding whether to admit statements under Fed.R.Evid. 803(24) . . . we've recognized that corroborating evidence is a valid consideration in determining the trustworthiness of out-of-court statements for purposes of Rule 803(24).

Valdez-Soto, 31 F.3d at 1471.

The decisions of the United States Court of Military Appeals and the United States Court of Appeals for the Ninth Circuit are contrary to decisions of the United States Court of Appeals for the Seventh Circuit in *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979) (corroborating evidence is not relevant to the admissibility of a statement under a residual exception to the hearsay rule); *Doe v. United States,* 976 F.2d 1071 (7th Cir. 1992) (the court applies a *Wright* analysis in a civil case in which the Confrontation Clause is not applicable); and this Court's decision in *Wright*. This Court in *Wright* quoted *Huff* for the proposition that "[t]he circumstantial guarantees of trustworthiness on which the various specific exceptions to

the hearsay rule are based are those that existed at the time the statement was made and do not include those that may have been added by those using hindsight." *Wright*, 497 U.S. at 820.

By quoting *Huff*, the question was left open whether this Court intended to limit the consideration of indicia of reliability to the circumstances surrounding the making of the statement, regardless of whether the Confrontation Clause is at issue.

The dissent in *Valdez-Soto* did reason that this Court indicated, in the absence of a Confrontation Clause issue, that hearsay should not be admitted on the basis of corroboration. *Valdez-Soto*, 31 F.3d at 1476 (Zilly, J., dissenting). The dissent in *Valdez-Soto* found additional authority for prohibiting the use of corroborating evidence from the legislative history of the Senate Judiciary Committee when the committee reported:

> It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action.

Id. at 1477 (citation omitted).

In the present case, the lower courts relied upon corroborating evidence to determine the reliability of the

hearsay statement. The use of corroborating evidence in this matter was erroneous and requires reversal of petitioner's conviction.

In addition to the language in *Wright*, the reasoning behind the rules of hearsay also suggest that corroborating evidence should not be considered. Military Rules of Evidence 803(1)-(23) and 804(b)(1)-(4) all determine reliability by examining the circumstances surrounding the making of the statement. Looking to the circumstances surrounding the making of the statement is the analysis by which we have received the enumerated exceptions to the hearsay rule. *Wright*, 497 U.S. at 820 (discussing some of the enumerated exceptions and describing the basis for their reliability); *McGrath,* 39 M.J. at 172 (Wiss, J., dissenting) (exceptions under 804(b)(1)-(4) and 803(1)-(23) in every instance base reliability on some type of circumstance surrounding the making of the statement).

Therefore, the wording of Mil .R. Evid. 803(24) and 804(b)(5) indicates that statements considered under it should meet the same requirements establishing the other exceptions to the hearsay rule, even when the Confrontation Clause is not at issue. The plain meaning of 803(24) and 804(b)(5) dictates that statements offered under these rules should at a minimum contain reliability that is equivalent to the enumerated exceptions. When a hearsay statement is sought to be admitted pursuant to a residual exception the courts should not have to lower the standards of reliability to find admissibility.

Further, a number of the enumerated exceptions have been labeled as "firmly rooted" exceptions. This Court has recognized that statements admitted under a "firmly rooted" hearsay exception are so trustworthy that adversarial testing would add little to their reliability. *Wright* 497 U.S. at 821. In determining the reliability for a non-firmly rooted exception under 803(24) or 804(b)(5),

the statement should be subjected to the same scrutiny as the firmly rooted exceptions. Mil. R. Evid. 803(24) and 804(b)(5) specifically provide that for a statement to be admitted under this exception it must have "equivalent circumstantial guarantees of trustworthiness."

Concerning trustworthiness this Court stated in *Wright* that:

> Because evidence possessing "particularized guarantees of trustworthiness" must be at least as reliable as evidence admitted under a firmly rooted exception we think that evidence admitted under the former requirement must similarly be so trustworthy that the adversarial testing would add little to its reliability.

Id. at 821 (citation omitted). Our judicial system views with such disfavor the use of hearsay evidence that it is specifically prohibited by Mil. R. Evid. 802. Mil. R. Evid. 803 and 804 provide exceptions to this prohibition in certain instances that guarantee reliability and trustworthiness.

Thus, not only should the residual hearsay exceptions possess equivalent guarantees of reliability and trustworthiness as those found in the other enumerated exceptions, they should possess the equivalent guarantees of reliability and trustworthiness as those found in the firmly rooted exceptions. The vehicle by which this protection should be provided is to look to the circumstances surrounding the making of the statement and not by bootstrapping reliability to some other extrinsic evidence.

The court below lowered the standard of admissibility to bootstrap in an otherwise unreliable statement. The use

of corroborating evidence was the **only** means by which the lower court could establish reliability. When petitioner's case first appeared before the United States Court of Military Appeals the court found reliability from the "entire record," while Chief Judge Everett in his dissenting opinion stated, "I find the circumstances surrounding the statement to be quite the contrary." *Martindale*, 30 M.J. at 176 (Everett, C.J., dissenting). Chief Judge Everett analyzed the circumstances surrounding the making of the statement in depth, and rightly concluded that the statement was unreliable. *Id.* Bootstrapping corroborating evidence, as the courts below have consistently had to do to justify finding the statement admissible, does not in reality alter the reliability of the statement. *See Wright*, 497 U.S. at 823-24.

When looking at the facts that surround the making of the hearsay statement in this case it becomes quite obvious that the statement does not contain "particularized guarantees of trustworthiness," "circumstantial guarantees of trustworthiness," or any shred of reliability. In fact, the circumstances surrounding the making of this statement are more suspect and less reliable than the circumstances surrounding the statement in *Wright*. Consequently, corroborating evidence should not be considered even when the right to confrontation is not at issue.

CONCLUSION

The lower court has developed an analysis of unavailability which has resulted in a twisting of the rules of evidence, and a trial procedure that violates the Constitution. Further, the court has greatly expanded the class of admissible hearsay statements, to now include statements which do not contain indicia of reliability equivalent to statements admitted under an enumerated

exception. This Court should address the question of whether either of these procedures is permissible.

Respectfully submitted,

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LISA HIGDON MACPHEE
Washington, D.C.

December, 1994.

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 54,536

NMCM 85 0771S

UNITED STATES, *Appellee,*

v.

Ronald E. Martindale, *Appellant.*

Argued Apr. 7, 1994
Decided Sep. 16, 1994

For Appellant: *Lieutenant Lisa M. Higdon*, JAGC, USNR (argued).

For Appellee: *Captain A. Diaz*, USMC (argued); *Colonel T. G. Hess*, USMC, *Commander A. Stallings*, JAGC, USN, *Major Laura L. Scudder*, USMC (on brief); *Lieutenant Commander Lawrence W. Muschamp*, JAGC, USN.

Opinion of the Court

COX, Judge:

The lengthy appellate history of this case has already been extensively chronicled. *See United States v. Martindale*, 30 MJ 172 (CMA 1990), *opinion vacated*, 32

MJ 33 (CMA 1990); and *United States v. Martindale*, 36 MJ 870, 872 (NMCMR 1993) (on remand). Appellant stands convicted of attempted sodomy (2 specifications); sodomy (13 specifications); and committing an indecent act with a minor, in violation of Articles 80, 125, and 134, Uniform Code of Military Justice, 10 USC §§ 880, 925, and 934, respectively. All offense were committed by appellant on his adopted, learning-disabled son, who was under the age of 16.

We granted review of three issues. 39 MJ 69. The first issue questions whether the Court of Military Review erred in holding that the hearsay declarant was available for cross-examination under the Confrontation Clause of the Sixth Amendment. The second issue questions whether that same court erred in holding that corroborating evidence can be used to determine the "equivalent circumstantial guarantees of trustworthiness" requirement of the residual hearsay evidentiary rules. The final issue questions whether that court erred in holding that the Secretary of the Navy's Instruction 1752.3 was not violated in this case. For the reasons indicated by the Court of Military Review, we affirm.

The first two issues are resolved by our recent opinion in *United States v. McGrath*, 39 MJ 158 (CMA 1994), where a majority of this Court came to the same conclusions, for the same reasons as did the Court of Military Review, regarding the applicability of *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). Both our McGrath opinion and the opinion below held that the Wright-Sixth Amendment rule, precluding use of corroborating evidence to buttress the "indicia of reliability" of hearsay statements for confrontation purposes, did not apply when the right to confront the

hearsay declarant was expressly waived at trial. 39 MJ at 163-67; and 36 MJ at 873-81. In other words, an accused cannot eschew confrontation at trial and then prevail on appeal on a denial-of-confrontation theory. In addition, both this Court's opinion in *McGrath* and the opinion below concluded that it was permissible to analyze the reliability level of the "equivalent circumstantial guarantees of trustworthiness" prong of the residual hearsay rules (Mil.R.Evid. 803(24) and 804(b)(5)) unencumbered by the Wright-Sixth Amendment restriction, where confrontation was so waived. 39 MJ at 166-67; and 36 MJ at 880-81.

The instant case featured an unusually unexpected and voluntary confession of crime. 30 MJ at 173. The hearsay statement in issue was offered to corroborate the confession. The witness-declarant was tendered to the defense, but the defense expressly waived the right to be confronted by the witness at trial. *See* 36 MJ at 875. Therefore, appellant's confrontation claim is without merit. *United States v. McGrath, supra.* In addition, we previously sustained the judge's ruling on the "equivalent circumstantial guarantees of trustworthiness" requirement of the residual hearsay rule (*i.e.*, the level of reliability), based in part upon the multitude of evidence presented at the suppression-motion hearing to corroborate the hearsay statement. 30 MJ at 175. We adhere to our prior ruling in that respect.

Appellant's final claim is that Secretary of the Navy Instruction 1752.3 (the "Family Advocacy Program") provided appellant immunity for his incriminating statements. Appellant originally blurted out his astonishing confession to an Overeaters' Anonymous counselor at a program being conducted at a naval hospital. Later, appellant repeated his statement to a Family Advocacy

advisor and, after purgative warnings, to a Naval Investigative Service (NIS) agent. With respect to the applicability of and effect of this Instruction on these facts, we concur fully with the Court of Military Review that appellant's statement to the NIS agent was neither tainted nor barred by a grant of immunity. 36 MJ at 881-82.

The 1993 decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judges CRAWFORD and GIERKE concur.

SULLIVAN, Chief Judge (dissenting):

I respectfully dissent from the majority's opinion for the reasons set forth in my separate opinion in *United States v. McGrath*, 39 MJ 158, 169 (CMA 1994). Specifically, the Court of Military Review erred by relying on corroborating evidence, *i.e*, the testimony of the clinical psychologist and appellant's confession, in concluding that the military judge did not abuse his discretion in admitting the victim's out-of-court statement. 36 MJ 870, 881 (1993). Therefore, I would reverse the decision of the appellate court below and remand this case to that court for further reconsideration in light of *Idaho v. Wright*, 497 U.S. 805, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990). *See United States v. McGrath, supra* (Sullivan, C.J., dissenting). In light of my resolution of the second granted issue, I need not comment on the other granted issues. *United States v. Martindale*, No. 54,536.

WISS, Judge (dissenting).

For the reasons set forth in my separate opinion and that of the Chief Judge, in which I joined, in *United States v.*

McGrath, 39 MJ 158, 172, and 169 (CMA 1994), I dissent from the majority opinion as to Issues I and II. *See also United States v. Martindale*, 30 MJ 172, 175-77 (Everett, C.J., dissenting). I would set aside the findings and sentence and, given the state of the record, dismiss the Charges and specifications. In this light, I do not need to address Issue III.

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 Stovall Street
Alexandria, VA 22332

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

BEFORE

R. A. STRICKLAND J. E. ORR
R. M. MOLLISON

UNITED STATES

v.

RONALD E. MARTINDALE, 430 92 8298
Cryptologic Technician (Collection) Second Class (E-5)
U.S. Navy

NMCM 85 0771 Decided 11 January 1993

Sentence adjudged 19 March 1984. Military Judge: A. Richard Philpott. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Base Pearl Harbor, Box 110, Pearl Harbor, HI 96860-5020.

LT R. M. MEDEIROS, JAGC, USNR, Appellate Defense Counsel.

LT L. M. HIGDON, JAGC, USNR, Appellate Defense Counsel.

LCDR LAWRENCE W. MUSCHAMP, JAGC, USN, Appellate Government Counsel.

MOLLISON, Judge:

This remand addresses three principal issues: (1) whether an alleged child abuse victim's out-of-court statement to agents of the Naval Investigative Service (NIS) was admitted in evidence in violation of the Confrontation Clause of the Sixth Amendment to the Constitution, (2) whether the same statement was properly admitted under the residual hearsay exceptions to the rule against hearsay, and (3) whether an accused's prosecution was barred by the Secretary of the Navy instruction establishing policies for the Family Advocacy Program.

Background

The appellant confessed to sexual abuse of his learning-disabled son. He was tried by a general court-martial composed of officer members. As proof of the appellant's crimes, the Government offered the appellant's confession to NIS and a transcript of an NIS interview with his alleged victim. The transcript of the corroborating out-of-court statement was offered under the residual hearsay exceptions to the hearsay rule. Mil. R. Evid. 802, 803(24), 804(b)(5). The appellant objected to the alleged victim's out-of-court statement on

grounds it did not qualify for admission under the exceptions. Mil. R. Evid. 103(a)(1). He also moved to suppress his confession on grounds it was uncorroborated. Manual for Courts-Martial, United States, 1969 (Rev.), P 69A; Mil. R. Evid. 304(a), (g). The military judge denied the motion to suppress and admitted both items in evidence. Mil. R. Evid. 104(a), 304(d)(4). The appellant pled not guilty. Based on this evidence, the appellant was convicted of two specifications of attempted anal sodomy with a child, 13 specifications of oral sodomy with a child, and one specification of indecent acts with a child in violation of Articles 80, 125, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 880, 925, 934, respectively. The appellant was sentenced on 19 March 1984 to confinement for five years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

This Court affirmed the appellant's conviction and sentence on 30 December 1985. After remand from the United States Court of Military Appeals, this Court again affirmed on 6 January 1989. The Court of Military Appeals also affirmed on 12 June 1990. 30 M.J. 172. However, on 19 September 1990, after the United States Supreme Court's decision in the case of *Idaho v. Wright*, 110 S. Ct. 3139 (1990), the Court of Military Appeals granted the appellant's motion for reconsideration, set aside this Court's second affirmance, and remanded the record a second time for consideration of these two issues:

I

WHETHER THE TRANSCRIPT OF AN ORAL UNSWORN STATEMENT OF THE VICTIM WAS ADMISSIBLE UNDER *IDAHO V. WRIGHT*, 497 U.S. 805, 110 S. Ct. 3139, 111 L.Ed.2d 638 (1990).

II

WHETHER APPELLANT'S PROSECUTION VIOLATED SECRETARY OF THE NAVY INSTRUCTION 1752.3.

32 M.J. 33 (C.M.A. 1990) (summary disposition).

Idaho v. Wright interprets the application of the Confrontation Clause to out-of-court statements introduced under exceptions to the rule against hearsay, whereas, the aforementioned Secretary of the Navy instruction established the Family Advocacy Program policy within the Department of the Navy. The material facts of the case have been fully set forth in the Court of Military Appeals' affirmance (30 M.J. at 173-75) and, therefore, will not be restated, except as may be necessary to our resolution of the issues.

We conclude that the admission of the child victim's out-of-court statement did not violate the Confrontation Clause, as interpreted in *Idaho v. Wright*; that the military judge did not abuse his discretion in admitting the child's out-of-court statement under the residual hearsay exceptions to the hearsay rule; and, that the

appellant's prosecution did not violate Secretary of the Navy Instruction 1752.3. Accordingly, we again affirm the appellant's conviction and sentence.

I.

The Confrontation Clause

The Confrontation Clause of the Sixth Amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI, cl. 5. The Confrontation Clause's origins are ancient. *Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988). The Confrontation Clause envisions:

> a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worth of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895). The Confrontation Clause bars the admission of some, but not all, evidence that would otherwise be admissible under an exception to the hearsay rule. *Wright*, 110 S. Ct. at 3145-46. When evidence is admitted contrary to the Confrontation Clause, the error is of constitutional proportions, and the conviction must be reversed by the reviewing court unless the error is harmless beyond a

reasonable doubt. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *United States v. Greer*, 33 M.J. 426, 431 (C.M.A. 1991).

"Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination." *Delaware v. Fensterer*, 474 U.S. 15, 18 (1985) (per curiam). In *Ohio v. Roberts*, 448 U.S. 56 (1980), the United States Supreme Court considered the first category. There it set forth a general approach for determining when incriminating out-of-court statements, otherwise admissible under an exception to the hearsay rule, may be admitted without violating the Confrontation Clause. In order for such hearsay to be admitted without violating the Confrontation Clause, the hearsay must have "indicia of reliability." "Indicia of reliability" may be found: (1) when the hearsay falls within a firmly-rooted exception to the rule against hearsay, or (2) when it is supported by "a showing of particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66. In *Idaho v. Wright*, the Supreme Court further held that the totality of the circumstances should be considered when determining whether there are particularized guarantees of trustworthiness, but these circumstances are limited to those surrounding the making of the statement and do not include other evidence at trial that corroborates the truth of the statement. "To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other

evidence at trial."[7] *Wright*, 110 S. Ct. at 3150.

The Confrontation Clause applies in trials by court-martial. *United States v. Jacoby*, 11 C.M.A. 428, 29 C.M.R. 244 (1960).

"'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.'" *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (quoting 5 J. Wigmore, Evidence § 1395 (3d ed. 1940)). There is generally no Confrontation Clause issue, however, when the declarant testifies or when the declarant is available to testify. *E.g., United States v. Owens*, 484 U.S. 554 (1988); *California v. Green*, 399 U.S. 149 (1970); *United States v. Dean*, 31 M.J. 196 (C.M.A. 1990), *cert. denied*, 111 S. Ct. 1106 (1991); *United States v. Quick*, 26 M.J. 460 (C.M.A. 1988); *United States v. Lyons*, 33 M.J. 543 (A.C.M.R. 1991) (citing cases), *aff'd on other grounds*, 36 M.J. 183 (C.M.A. 1992).

"Confrontation means more than being allowed to confront the witness physically." *Davis*, 415 U.S. at 315. For example, Confrontation Clause questions will arise when restrictions on cross-examination may "'effectively . . . emasculate the right of confrontation itself.'" *Fensterer*, 474 U.S. at 19 (quoting *Smith v.*

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[7] The application of Wright continues to evolve. For example, the Supreme Court has recently held that the Confrontation Clause, Roberts and Wright do not preclude the admission of evidence qualifying under firmly-rooted exceptions to the hearsay rule, such as the "spontaneous declaration" and "medical examination" exceptions, even though the non-testifying declarant is available to be called as a witness. *White v. Illinois*, 112 S. Ct. 736 (1992).

Illinois, 390 U.S. 129, 131 (1968)). Accordingly, when a witness asserts his privilege against self-incrimination and refuses to answer questions on cross-examination, he is subject to having his direct testimony stricken on the basis of the Confrontation Clause. *United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977). For the same reason the same witness' out-of-court statements will also be inadmissible in the absence of "indicia of reliability." *United States v. Gomez-Lemos*, 939 F.2d 326 (6th Cir. 1991). Similarly, if "a child is so young that she cannot be cross-examined at all, or if she is simply too young and too frightened to be subject to a thorough direct or cross-examination, the fact that she is physically present in the courtroom should not, in and of itself, satisfy the demands of the Clause." *United States v. Spotted War Bonnet*, 933 F.2d 1471, 1474 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1187 (1992) (citation and quotations omitted) (on remand from the Supreme Court). But,

> the Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.

Fensterer, 474 U.S. at 21-22, 106 S.Ct. at 295.

The appellant's 12-year old son testified and was subject to cross-examination at a pretrial hearing at which the court ruled in limine on the admissibility of the child's out-of-court statement to NIS. At that hearing, the child responded to questions posed by both parties. In substance, he recalled talking with the NIS agents, but he either could not remember acts of sexual abuse and the contents of the statement he made to NIS, or he chose not to. Record at 132-43. The child's pretrial deposition was also considered by the military judge for purposes of ruling on the admissibility of the child's out-of-court statement.[8] Appellate Exhibit XIV; record at 150. Mil. R. Evid. 104(a); *see Bourjaily v. United States*, 483 U.S. 171 (1987). The appellant and his counsel were present at the taking of the deposition and the appellant's son was available for cross-examination. At the deposition, the child testified he had told the NIS agents the truth, but again could not recall acts of abuse or chose to forget them.

After the military judge admitted the transcript of the child's out-of-court statement to NIS, the following colloquy occurred:

> MILITARY JUDGE: First of all, under the rules, when the statement of a hearsay declarant is admitted, the declarant's credibility is placed in issue just as if he testified. Secondly, I want to scrupulously and within the maximum limits of my authority preserve the Defense right to cross -- confront and cross-examine [the

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[8] The deposition was not offered on the merits and did not go to the members.

declarant]. So accordingly, if Defense wishes him produced or -- Let me add an additional option, and that is the option -- and I accord this to you, Defense Counsel -- if you wish [the declarant] produced and placed on the stand to testify as to whatever he can or cannot and then wish to cross-examine him and to require me to do so -- or to require me to so order the Government, I'm prepared to do so in order to preserve your right to confront and to cross-examine.

DEFENSE COUNSEL: Yes, Your Honor. After consulting with my client, it is not the Defense's desire to have [the declarant] to be forced to call and testify again about the events contained in his statement. Defense, for the record, again believes that an order by the Judge that he testify will have no more effect than it did before. However, the Defense does plan on calling [the declarant] in mitigation.

MILITARY JUDGE: Very well. My point is that -- and I don't ask that you implicitly waive anything. The burden of proof is on the Government. But I will give you the opportunity to confront and cross-examine him and to do so as a part of the Government's case, not placing, therefore any burden on you at all. And all you need do is simply say the word that you desire, and he will be produced. Whatever the Government wishes to ask or

> whatever he testifies to, proper scope of cross-examination will be anything in [the declarant's out-of-court statement] and that relates to these offenses. Do you desire that he be produced in any part of the Government's case-in-chief?
>
> DEFENSE COUNSEL: [No response.]
>
> MILITARY JUDGE: Again, when I say "desire," I understand about burden of proof. I'm just preserving you right to confront and cross-examine.
>
> DEFENSE COUNSEL: No, Your Honor. We do not.

Record at 288-289. Finally, during the pre-sentencing procedure the appellant's son was called by the appellant, and his son testified in his behalf.

The appellant was afforded a full and fair opportunity to probe and expose the infirmities in the child's ability to perceive, recall and relate events, to probe and expose the child's motivations, such as bias, fear, love, or hatred, and thereby to call to the attention of the fact-finder the reasons for giving scant weight to the child's statement. The alleged victim's forgetfulness and possible evasiveness did not deprive the appellant of the fruits of cross-examination. They were exactly the things that cross-examination and the Confrontation Clause are designed to expose. In short, the posture of the case is not of a witness refusing to respond to questions on cross-examination on grounds of self-incrimination as in *Rivas* or *Gomez-Lemos*. Rather, the

witness was more like a forgetful or evasive witness as in *Owens, Fensterer, Green* or *Spotted War Bonnet*. The fruits of cross-examination were there for the appellant to pick or to leave alone as he saw fit. Under these circumstances, viz., (1) the declarant testified during the suppression hearing at which the appellant was afforded an opportunity for effective cross-examination, (2) the declarant testified at a pretrial deposition at which the appellant was afforded the opportunity for effective cross-examination, (3) the appellant expressly declined trial court's offer to place the declarant on the stand in the Government's case-in-chief for purposes of cross-examination and confrontation, and (4) the declarant was actually called by the appellant during the pre-sentencing procedure, we conclude that the Confrontation Clause was satisfied. *Owens; Dean; Quick*. Finding the Confrontation Clause was satisfied, we further conclude the finer points of the Clause's application to the out-of-court statements of non-testifying declarants, as announced in *Wright*, are therefore not in issue.

The Residual Hearsay Exception[9]

The President has been authorized by Congress to promulgate court-martial trial procedures, including modes of proof. Art. 36(a), UCMJ, 10 U.S.C. § 836(a). The President's regulations apply, so far as he considers practicable, the rules of evidence generally recognized in the trial of criminal cases in United States district courts. Id. Pursuant to this statutory authority, the President has promulgated the Military Rules of Evidence [hereinafter "Rule(s)" or "Mil. R. Evid."].

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[9] A Court of Military Review must obey implicitly the mandates of the remanding court. When a case is remanded in limited terms, it must confine its review to matters within those limitations. The scope of review must be interpreted closely. *United States v. Jordan*, 35 M.J. 856 (N.M.C.M.R. 1992). Having noted that Idaho v. Wright is a Confrontation Clause case and the Confrontation Clause was satisfied in this case, it might appear we are venturing beyond the scope of our remand when we revisit the question of whether the child's out-of-court statement was admissible under the residual hearsay exception to the hearsay exclusionary rule, quite aside from the Constitution's Confrontation Clause. We believe that the issues -- Confrontation Clause and admissibility as residual hearsay -- are so intertwined that the remand fairly embraces the latter. We also note that in *United States v. Hines*, 23 M.J. 125 (C.M.A. 1986), the Court of Military Appeals "constitutionalized" the criteria for admitting residual hearsay. Therefore, if we apply Hines strictly, Wright limits the admissibility of residual hearsay despite the fact the Confrontation Clause itself has not been violated. Hence, within the terms of the remand, we would still be obliged to address the impact of *Wright* on the admissibility of the out-of-court statement under our own evidentiary rules. If we fail to address the statement's qualification as residual hearsay by limiting the scope of our review, we would be in effect "deconstitutionalizing" the criteria for admitting residual hearsay, contrary to *Hines*. We prefer to confront this issue head on, and we presume the Court of Military Appeals expected nothing less. We proceed accordingly.

All relevant evidence is admissible in trials by court-martial, unless admission is otherwise limited by the Constitution, statutes, or the rules, themselves. All irrelevant evidence is inadmissible. Mil. R. Evid. 402. Hearsay, though relevant, is inadmissible under the rules, unless it qualifies under an exception to the rule excluding hearsay. Mil. R. Evid. 801, 802, 803, 804.

Rule 804 permits the admission of certain forms of hearsay when the declarant is unavailable as a witness. Rule 803 permits the admission of certain forms of hearsay whether or not the declarant is available as a witness. Both rules permit the admission of hearsay not specifically covered by other exceptions to the rule of inadmissibility. These are the so-called "residual hearsay exceptions." The two residual hearsay exceptions (declarant unavailable/declarant available) are virtually identical. Thus, under either rule, the following is admissible:

> A statement not specifically covered by any of the foregoing exceptions [to the rule against hearsay] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

Mil. R. Evid. 803(24), 804(b)(5) (brackets and emphasis added).

The military judge determines whether the evidence is admissible. Mil. R. Evid. 104(a). The military judge has considerable discretion in determining the trustworthiness and admissibility of a statement under the residual hearsay exception, and the military judge's determination to admit evidence under this exception normally will not be reversed except for an abuse of that discretion. *United States v. Powell*, 22 M.J. 141, 145 (C.M.A. 1986); *United States v. Ortiz*, 34 M.J. 831, 835 (A.F.C.M.R. 1992); *Lyons*, 33 M.J. at 543.

The Government offered the child's out-of-court statement under both residual hearsay exceptions although it was of the opinion the child was not available. Record at 244-245, 248, 255. The trial defense counsel argued the child was available but urged that his out-of-court statements lacked circumstantial guarantees of trustworthiness. Record at 252-55. The military judge found the child was unavailable under Rule 804(a)(2) (persistent refusal to testify) and Rule 804(a)(3) (lack of memory). Record at 260. However, he admitted the out-of-court statement under both residual hearsay exceptions. Record at 260-61. In doing so, the military judge found the criteria for admissibility were satisfied, but he did not identify the specific "equivalent circumstantial guarantees of trustworthiness" upon which he relied. We must determine whether he abused his discretion in admitting the child's out-of-court statement.

We pause, however, to make three observations. The first is that inasmuch as the residual hearsay exceptions

are virtually identical under either Rule 803 or 804, a determination of "unavailability" is not an indispensable prerequisite to a ruling that hearsay is admissible as "residual hearsay." In fact, Rule 804(b)(5), (residual hearsay exception/declarant unavailable) is superfluous in light of Rule 803(24) (residual hearsay exception/availability of declarant immaterial). Mil. R. Evid. 804(b)(5) Analysis. *See also Lyons*, 36 M.J. at 186 n.2. The availability of the declarant, however, remains a factor in determining whether the other criteria for admitting "residual hearsay" are satisfied: Does the hearsay statement have circumstantial guarantees of trustworthiness equivalent to the other specific hearsay exceptions? Is it more probative on the point for which it is offered than any other available evidence? Are the purposes of the evidentiary rules and the interests of justice served by its admission?

Secondly, we observe that the military judge's determination that the witness was unavailable for purposes of admitting his out-of-court statement under a residual hearsay exception is not inconsistent with our determination that the same witness was available for Confrontation Clause purposes. As discussed above, the presence of the witness and the content of the expected testimony were sufficient to satisfy the Confrontation Clause's requirement to afford the opportunity for effective cross-examination. As we will discuss in greater detail *infra*, there is overlap, but not congruence, between the Confrontation Clause and hearsay rules. *Green*, 399 U.S. at 155-56. The characterizations of "unavailability" are made for different purposes, and there is no requirement that they coincide. *Cf. Owens*, 484 U.S. at 564.

Thirdly, and of greatest importance to the appellant's case, we are of the view that *Wright* interprets the Constitution's Confrontation Clause, but does not purport to interpret rules of evidence, *per se*. In other words, we believe that while the requirements of the Confrontation Clause's "particularized guarantees of trustworthiness" and the residual hearsay exception's "equivalent circumstantial guarantees of trustworthiness" have common features, they are not identical. Specifically, the two rules part company when it comes to determining whether extrinsic, corroborating evidence may be considered as a circumstance justifying admission.[10] This point is pivotal to the appellant's case. It requires a brief comparison of the Confrontation Clause and the hearsay exceptions.[11]

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[10] Wright holds that when deciding whether an out-of-court statement possesses "particularized guarantees of trustworthiness" for Confrontation Clause purposes, a court may not consider extrinsic or corroborating circumstances. In practical terms, the court could not consider the accused's own confession. *Greer*. We are of the opinion this same limitation does not apply in determining whether the out-of-court statement possesses "equivalent circumstantial guarantees of trustworthiness" for the purposes of Rules 803 and 804 when the Confrontation Clause, itself, has been otherwise satisfied. Because the Confrontation Clause was satisfied in the appellant's case, the practical effect of our conclusion is that the appellant's own confession could be used when determining whether his son's out-of-court statement possessed "equivalent circumstantial guarantees of trustworthiness" justifying its admission under the residual hearsay exceptions.

[11] We are mindful of the Court of Military Appeals' decision in Hines, wherein the Court (Cox, J.) noted:

> The constitutional requirement that the evidence be taken under circumstances bearing "indicia of reliability" appears on its face to be closely related to the evidentiary requirement that the evidence have

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> "equivalent circumstantial guarantees of trustworthiness." Since, to be admissible, residual hearsay statements have to pass both constitutional and evidentiary muster, we can see no harm in "constitutionalizing" this aspect of Mil. R. Evid. 804(b)(5). Therefore, we agree with those courts that have construed these requirements to be equivalent. *See e.g., United States v. Nick*, 604 F.2d 1199, 1203 (9th Cir. 1979); *United States v. West*, 574 F.2d [1131,] 1138 [(4th Cir. 1978)].

23 M.J. at 134.

A Court of Military Review is not generally free to ignore the precedent established by the Court of Military Appeals. *United States v. Jones*, 23 M.J. 301, 302 (C.M.A. 1987). However, we believe our senior Court does not intend us to be bound by a case decision mindless of the impact that subsequent developments in the law may have upon it. *Hines* predates *Wright*. Our reading of Hines suggests that the admissibility of the out-of-court statements there was in large part predicated on the assumption that a corroborating circumstance, namely, the accused's confession, could be considered for both Confrontation Clause and evidentiary purposes. 23 M.J. at 137-38. Since *Wright*, the Court of Military Appeals has been obliged to retreat from that position insofar as the Confrontation Clause is concerned. *Greer*, 33 M.J. at 431. Most recently, Judge Cox of the Court of Military Appeals and author of Hines has noted that Wright overruled the Confrontation Clause aspects of Hines, but that Wright's application to residual hearsay offered under Rule 803(24) as an evidentiary matter remains an open question. *United States v. Lyons*, 36 M.J. at 188 (Cox, J., concurring); *United States v. Moreno*, 36 M.J. 107, 121 (C.M.A. 1992) (Cox, J.). Meanwhile, Judge Crawford of the same Court has already expressed her view that "the factors as to 'particularized guarantees of trustworthiness' under the Confrontation Clause versus the 'guarantees of trustworthiness' under the residual hearsay rule are different." *Lyons*, 36 M.J. at 189 (Crawford, J., concurring). Whereas no harm to the fact-finding process was perceived to exist at the time of *Hines*, significant harm to it could now occur if evidence, sufficiently trustworthy to be admitted under evidentiary rules, must be formalistically excluded under Confrontation Clause requirements even though the Confrontation Clause has, itself, been satisfied.

The Confrontation Clause and the evidentiary hearsay rule stem from the same roots and are generally designed

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Therefore, we believe on remand the Court of Military Appeals expected that this Court would be free to consider whether *Hines* has continued vitality insofar as it welded the residual hearsay exception to the Confrontation Clause.

The Confrontation Clause's test of "particularized guarantees of trustworthiness" is linguistically very similar to the residual hearsay exception's test of "equivalent circumstantial guarantees of trustworthiness." While such similarities are useful, they do not mandate the conclusion that the tests must be equivalent. *Cf. Owens*, 484 U.S. at 564. We are also mindful of *Wright's* quotation of *Huff v. White Motor Corporation*, 609 F.2d 286 (7th Cir. 1979), wherein the Seventh Circuit Court of Appeals observed (609 F.2d at 292): "The circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight." *Wright*, 110 S. Ct. at 3149. By quoting with approval this passage from *Huff v. White Motor Corporation*, arguably the Supreme Court was holding that when determining whether there are "equivalent circumstantial guarantees of trustworthiness" under the residual hearsay exceptions, the fact-finder is similarly limited to circumstances surrounding the taking of the out-of-court statement and may not consider corroborating evidence, no matter how pertinent. We, however, are reluctant to read too much into Wright. The Court was closely divided on the Confrontation Clause issue, and it took great care not to equate the evidentiary rules with the Confrontation Clause.

The Army Court of Military Review has considered the same issue in *United States v. Palacios*, 32 M.J. 1047 (A.C.M.R. 1991), but found it unnecessary to resolve because it did not affect the outcome of the case. 32 M.J. at 1051 n.7. *But see United States v. Pacheco*, M.J. , No. 92-09 (A.C.M.R. 4 November 1992); *United States v. Valdez*, 35 M.J. 555, 563 (A.C.M.R. 1992); *United States v. Pollard*, 34 M.J. 1008, 1011 (A.C.M.R. 1992). The Air Force Court of Military Review appears to have been presented with a similar issue in *Ortiz*, and appears to have found "equivalent circumstantial guarantees of trustworthiness" in a battered spouse's written statement to a security police investigator from corroborating statements she made earlier. 34 M.J. at 835.

to protect similar values, but the Supreme Court has not viewed them as congruent, and in Wright it took care not to equate the two. *Wright*, 110 S. Ct. at 3146; *Dutton v. Evans*, 400 U.S. 74, 86 (1970); *Green*, 399 U.S. at 155-56. The Confrontation Clause "helps assure the 'accuracy of the fact-finding process,'" and denial of confrontation "calls into question the ultimate 'integrity of the fact-finding process.'"[12] *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (quoting *Dutton v. Evans* and *Berger v. California*, 393 U.S. 314, 315 (1969)). To achieve its values, the Confrontation Clause: (1) insures the witness is placed under oath and is subject to the penalty for perjury, thus impressing upon the witness the seriousness of the matter and his obligation to tell the truth, (2) forces the witness to submit to cross-examination, "the greatest legal engine ever invented for the discovery of the truth," and (3) aids the jury in determining the witness' credibility by observing his demeanor. *Green*, 399 U.S. at 158. "The combined effect of these elements -- physical presence, oath, cross-examination, and observation of demeanor by the trier of fact -- serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." *Maryland v. Craig*, 110 S. Ct. 3157, 3163 (1990). In addition to promoting reliability in the fact-finding process, the Confrontation Clause serves "symbolic goals." *Lee v. Illinois*, 476 U.S. 530,

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[12] "The mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." *Dutton v. Evans*, 400 U.S. at 89.

540 (1986). "Given [the] human feelings of what is necessary for fairness, the right of confrontation 'contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails.'" *Coy v. Iowa*, 487 U.S. 1012, 1018-19 (1988) (quoting *Lee v. Illinois*, 476 U.S. at 540).

"The hearsay rule is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the trier of fact." *Chambers*, 410 U.S. at 298. Hearsay statements are traditionally excluded for the same reasons articulated respecting violations of the Confrontation Clause, that is, they lack conventional indicia of reliability: they are not made under oath or other circumstances impressing the declarant of their solemnity, there is no cross-examination, and there is no opportunity to judge the declarant's demeanor. *Id.* However, "a number of exceptions [to the rule against hearsay] have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination." *Id.* at 298-99. Aside from the residual hearsay exceptions, the Military Rules of Evidence set out 27 exceptions to the rule against hearsay, plus two other circumstances in which out-of-court statements are not classified as "hearsay" and hence do not fall within the rule against hearsay. Mil. R. Evid. 801(d), 803, 804. These specific exceptions derive their reliability from the circumstances under which they were made or the statement's content.

The residual hearsay exceptions, themselves, apply only to highly reliable and necessary evidence. *United States*

v. Giambra, 33 M.J. 331, 334 (C.M.A. 1991). In fact, Rules 803(24) and 804(b)(5) are taken from Federal Rules of Evidence 803(24) and 804(b)(5) without change. Mil. R. Evid. 803(24), 804(b)(5) Analysis. These evidentiary rules are to be employed in the same manner their federal counterparts are generally applied in other federal courts. *Powell*, 22 M.J. at 143. In adopting the Federal Rules, Congress "intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances." S. Rep. No. 1277, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7065, cited in *United States v. Guaglione*, 27 M.J. 268, 274 (C.M.A. 1988). The trial judge, however, has considerable discretion in determining the trustworthiness and admissibility of a statement under the residual hearsay exception. *Powell*, 22 M.J. at 145; *Ortiz*, 34 M.J. at 835; *Lyons*, 33 M.J. at 543. "The facts of individual cases will frequently defy the application of hard-and-fast rules. Rather, what must generally occur is the balancing of a variety of circumstances unique to a particular case." *Powell*, 22 M.J. at 145.

In summary, the Confrontation Clause and hearsay rules overlap, but they are not congruent. They have similar roots and share similar values. They both share the common goal of promoting accuracy in fact-finding. They achieve those goals by somewhat different means. The Confrontation Clause focuses primarily on the mechanism of cross-examination, whereas the hearsay exceptions focus on associated circumstances from which the trial judge gleans a level of confidence in the evidence's trustworthiness meriting its consideration by the jury. For this purpose, oath, physical presence of the witness and cross-examination are relevant circumstances in judging trustworthiness, but not the sole means. The

Confrontation Clause directly promotes a symbolic value -- public confidence in the fact-finding process. The objective of the hearsay rules appears to be more pragmatic. It only promotes this additional value indirectly. Such a differentiation in values is consistent with the different sources of the Confrontation Clause and the rules of evidence -- the former being constitutional, the latter statutory and regulatory. Simply put, the Confrontation Clause embodies a fundamental constitutional right. The hearsay rules do not.

With these similarities and differences in mind, we are of the view that if the fundamental objectives of the Confrontation Clause, including its symbolic goal, have been achieved, there is no purpose to loading baggage on the hearsay rules which interferes with their sole objective of advancing the quest for the truth. More specifically, we see no reason to impose an arbitrary limitation on the range of circumstances the military judge may consider when determining whether hearsay possesses "equivalent circumstantial guarantees of trustworthiness" justifying its admission as an exception to the hearsay rule. In short, we hold that when the Confrontation Clause is otherwise satisfied, the military judge possesses the discretion to consider the totality of circumstances, including corroborating evidence, in determining whether hearsay has "equivalent circumstantial guarantees of trustworthiness" warranting its admission under the residual hearsay exceptions. *Cf. United States v. Hines*, 23 M.J. 125 (C.M.A. 1986); *United States v. Yeauger*, 24 M.J. 835 (N.M.C.M.R. 1987), *aff'd*, 27 M.J. 199 (C.M.A. 1988), *cert. denied*, 490 U.S. 1005 (1989). *See also Quick*, 26 M.J. at 461; *Powell*, 22 M.J. at 145.

We turn therefore to the evidentiary question: Whether the military judge abused his discretion in admitting the child's out of court statement as residual hearsay? We acknowledge we are at somewhat of a handicap because the military judge did not give his rationale. *Hines*, decided after appellant's case was tried, now clearly requires the military judge to state on the record the specific facts and circumstances which he thinks indicate that the hearsay statements have a sufficiently high degree of trustworthiness and necessity to justify their admission. *Hines*, 23 M.J. at 135. Clearly, something more than a mantra is contemplated. *See United States v. Brown*, 34 M.J. 1024, 1026 (N.M.C.M.R. 1992). Having said as much, we believe the record is sufficient for us to make an informed decision.

We apply the criteria set forth in Rule 803(24). The out-of-court statement was of a material fact. It was the victim's own confirmation that he had been sexually abused by his father. It appears there is no evidence more probative on the alleged crimes which the Government could procure with reasonable efforts. The child's out-of-court statement appears to be the only piece of evidence corroborating the appellant's confession. Mil. R. Evid. 304(g). There is nothing indicating other witnesses were present, and the likelihood that there were other witnesses is extremely remote. The general purpose of the rules and the interest of justice were served by admitting the statement in evidence. Again, the child's statement appears to be the only piece of corroborating evidence available, and it is in the interest of justice to protect children from unnecessary trauma and embarrassment in the courtroom. *Cf. Maryland v. Craig*, 110 S. Ct. at 3167. Finally, we find the following equivalent circumstantial guarantees

of trustworthiness: (1) the child's statement was taken by two persons, both of whom were called to explain the circumstances surrounding its recordation; (2) prior to taking the statement, an agent impressed upon the child the importance of telling the truth and the child swore to tell the truth; (3) the child was speaking from first hand knowledge; (4) no cogent motivation for the child to lie was suggested; (5) about two weeks after making the statement to NIS, the child was examined by a clinical psychologist who testified that child's symptoms were consistent with a sexually-abused child, that the child confirmed the acts of sodomy by his father, that the child expressed no ill will to his father, and that he was in fact concerned his father would be punished; (6) the same psychologist also testified that he had listened to the audiotapes of the NIS interview, that at time the child was a very pressured little boy, but from a clinical and structural point, his basic personality and integrity were quite intact, and that from his evaluations the child would not create anything out of his own fantasy or make statements that did not have some objective validity (*see United States v. Suarez*, 35 M.J. 374, 376 (C.M.A. 1992)); (7) the child was available to testify; and (8) the child's statement and the appellant's own confession which preceded it were mutually corroborating.[13] *See Yeauger; Hines; Powell.* Based on these circumstances, we conclude the military judge did not abuse his discretion in admitting the child's out-of-court statement.

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[13] *See Bourjaily*, 483 U.S. at 179-80 ("Individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constitent parts . . . [A] piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.")

II.

The second issue on remand was briefed and decided in our first affirmance of appellant's conviction and sentence. *United States v. Martindale*, No. 85-0771 (N.M.C.M.R. 20 December 1985). The appellant has offered nothing new in respect to this assignment of error. We reaffirm our previous holding. We note in particular: (1) that Secretary of the Navy Instruction 1752.3 was issued after the appellant made his statement to NIS; (2) that the instruction does not grant transactional immunity;[14] (3) that insofar as the instruction might be read to grant a use immunity to those who voluntarily refer themselves to the Family Advocacy Program, it was not violated in the appellant's case because his statements to Family Advocacy Program personnel were never used in evidence against him; (4) that the appellant was informed by Family Advocacy Program personnel that there was a possibility of prosecution; (5) that prior to appellant's confessing to NIS, the interrogating NIS agent expressly informed the appellant that prior statements by him could not be used against him, but that future statements made by him could be; (6) that nothing done by government representatives either gave the appellant a legitimate and reasonable expectation that he would not be subjected to punitive action or constituted an agreement upon which the appellant reasonably relied to his detriment (*United States v. Churnovic*, 22 M.J. 401 (C.M.A. 1986); *United*

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[14] Implied grants of immunity are in disfavor. *United States v. Sanders*, 33 M.J. 1026 (N.M.C.M.R. 1991). *See also United States v. Cooper*, 35 M.J. 417 (C.M.A. 1992) (in the absence of prejudice to the accused, dismissal is not mandated for violations of internal departmental policies by criminal investigators and informants).

States v. Brown, 13 M.J. 253 (C.M.A. 1982); *United States v. Zupkofska*, 34 M.J. 537 (A.F.C.M.R. 1991); *United States v. Spence*, 29 M.J. 630 (A.F.C.M.R. 1989)); and, (7) that assuming information concerning the appellant's child abuse improperly came to NIS' attention, the appellant's confession, made after complete warnings, including a "cleansing warning," and a waiver of the privilege against self-incrimination, was free of any taint that might have resulted from an alleged improper disclosure. *United States v. Norfleet*, 36 M.J. 129 (C.M.A. 1992) (unwarned admissions of child abuse made to a civilian contract counselor at a Family Service Center did not preclude introduction of subsequent warned admissions to NIS); *United States v. Williams*, 35 M.J. 323 (C.M.A. 1992) (results of voluntary urinalysis and confession to drug use were not the product of a prior urinalysis arguably inadmissible on the basis of an Air Force directive, rejecting the "but for" test for taint).

III.

Accordingly, the findings and sentence are reaffirmed.

R. M. MOLLISON

Senior Judges STRICKLAND and ORR concur.

R. A. STRICKLAND

JAMES E. ORR

APPENDIX C

U.S. COURT OF MILITARY APPEALS

No. 54536/NA
NMCM 85 0771

UNITED STATES, *Appellee*,

v.

Ronald E. Martindale, *Appellant*.

Decided Sep. 19, 1990

APPEAL -- SUMMARY DISPOSITION

On consideration of appellant's petition for reconsideration of opinion of the Court in *United States v. Martindale*, 30 MJ 172 (CMA 1990), in light of *Idaho v. Wright*, U.S. , 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), it is ordered that the petition for reconsideration be granted; that the mandate dated June 25, 1990, is vacated; that the decision of the United States Navy-Marine Corps Court of Military Review is set aside; and that the record of trial is returned to the Judge Advocate General of the Navy for remand to the Court of Military Review for consideration of the following issues:

I. Whether the transcript of an oral unsworn statement of the victim was admissible under *Idaho v. Wright*, U.S.

, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

II. Whether appellant's prosecution violated Secretary of the Navy Instruction 1752.3.

APPENDIX D

U.S. COURT OF MILITARY APPEALS

No. 54536/NA
NMCM 85 0771

UNITED STATES, *Appellee,*

v.

Ronald E. Martindale, *Appellant.*

Decided June 12, 1990

For Appellant: *Lieutenant Jeffrey S. Horwitz*, JAGC, USNR (argued).

For Appellee: *Lieutenant Commander Lawrence W. Muschamp*, JAGC, USN (argued); *Commander Thomas W. Osborne*, JAGC, USN (on brief); *Captain Wendell A. Kjos*, JAGC, USN.

Opinion of the Court

COX, Judge:

Appellant was tried by a general court-martial before members in March 1984. Contrary to his pleas, he was found guilty of two specifications of attempted sodomy, one specification of committing an indecent act with a minor, and thirteen specifications of sodomy, in violation

of Articles 80, 134, and 125, Uniform Code of Military Justice, 10 USC §§ 880, 934, and 925, respectively. These offenses were committed by appellant upon his adopted son, S, who was under 16 years of age. Appellant was sentenced to be confined for 5 years, reduced to pay grade E-1, and dishonorably discharged from the United States Navy. The convening authority approved the findings and sentence. The Court of Military Review in an unpublished decision affirmed the findings and sentence on December 30, 1985. In September 1986, this Court granted an issue raised in appellant's appeal asking us to determine if the "Court of Military Review err[ed] in holding that a transcript of the oral unsworn statement of [S] was properly admitted into evidence." By summary disposition, 24 MJ 405 (1987), we set aside the decision below and remanded the record of trial for further consideration in accordance with our decision in *United States v. Barror*, 23 MJ 370 (CMA 1987).

On January 6, 1989, after further reflection on the issue, the Court of Military Review found:

> [After] again examin[ing] the record of trial, the clemency petitions, the assignment of error . . . [we] have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. . . . Accordingly, the findings and sentence as approved on review below are affirmed.

Unpub.op. at 3.

This time we granted appellant's appeal to consider:

> WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING INTO EVIDENCE A TRANSCRIPT OF AN ORAL UNSWORN STATEMENT OF . . . [THE VICTIM, S].

We are called upon here to determine if the out-of-court statement of the alleged victim was admissible in evidence to corroborate appellant's confession. We conclude that the military judge did not err when he found admissible the transcript of the interview between the alleged victim and special agents of the Naval Investigative Service (NIS). In so holding, we conclude that the witness was "functionally unavailable" and, therefore, the decision to admit the evidence was justified. Mil.R.Evid. 804(a)(3), Manual for Courts-Martial, United States, 1969 (Revised edition). We are convinced that no aspect of this ruling denied appellant's right to confront the child accuser. *United States v. Quick*, 26 MJ 460 (CMA 1988). The witness was present at the suppression hearing, testified at a pretrial deposition, and, indeed, testified for his stepfather during the sentencing hearing. *See Coy v. Iowa*, 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988); *United States v. Owens*, 484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988). In addition, we have determined that sufficient evidence was introduced during the suppression hearing concerning admissibility of the confession to allow the military judge to conclude that the child's statement to the NIS special agents had sufficient "guarantees of trustworthiness" to make it reliable. Mil.R.Evid. 804(b)(5). *See United States v.*

Hines, 23 MJ 125 (CMA 1986).

This case was contested before members. The only evidence presented to them by the Government was appellant's confession and the contested statement. The latter, introduced through the testimony of NIS Special Agent Machin, was supported by evidence of a transcript of an interview between two NIS agents and the victim, appellant's adopted son. This statement was introduced through the testimony of NIS Special Agent Kellam. An explanation of the circumstances surrounding the confession and the subsequent interview of the child by the NIS agents is necessary for a complete understanding of the case.

Appellant was enrolled in Navy Over-Eaters Anonymous, a program which mirrored the "Twelve Steps" of Alcoholics Anonymous. "Step 5" of that program required each individual to admit his or her wrongs to another person. Because he was extremely distraught over his past sexual abuse of his stepson, which included fellatio and attempted anal intercourse, appellant decided to admit his actions to a counselor first and then to a Family Advocacy advisor. He ultimately confessed to NIS on January 13, 1984.[1] Five days later, appellant's wife was asked to bring her son to the NIS office to be interviewed.

Appellant filed a motion in limine asking the military judge to exclude the confession, claiming it lacked

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[1]Because of appellant's participation in this program, Part II of the dissent apparently expresses concern that appellant has been unfairly prosecuted. This issue is not before us. If Chief Judge Everett's instincts are correct, such is a matter for clemency consideration.

sufficient corroboration under Mil.R.Evid. 304(g). To substantiate appellant's admissions, the Government called the child as a witness. Although he was 12 years old, the child was emotionally and mentally disabled and could not read well. At the motion hearing, he testified that he could not remember what he told the NIS agents on January 18, and that he was unsure if what they said he told them was true. He also stated, in response to questioning from the military judge, "No, I don't want to tell you, 'cause I don't know." He repeated over and over that he did not remember the events or the interview. *See United States v. Owens, supra.*

Previously, the child had appeared at a deposition attended by trial and defense counsel, as well as appellant. There, he said that his statements to the NIS agents about his father's sexual abuse were true. However, just as he eventually did at the suppression hearing, he became very upset during the questioning and stated that he could no longer remember what he had said during the NIS interview.

Because he was either unable or unwilling to corroborate his stepfather's confession, the Government requested that the child be declared unavailable to testify and that, instead, a transcript of his interview with the NIS agents be admitted as an exception to the hearsay rule under Mil.R.Evid. 804(b)(5) or, if he was found available, Mil.R.Evid. 803(24). Defense counsel sought to exclude the transcript, arguing that the child was available and that the transcript lacked the "circumstantial guarantees of trustworthiness" required by either rule.

The NIS interview of the child lasted approximately 2 hours (from 3:30 to 5:05 p.m.). During that time, Agent Davis asked the child many questions, all of which were based upon appellant's written confession, which she had with her. The agents asked predominantly leading questions. During the first 30 minutes, they asked the child to sign a sworn statement, but upon learning that his reading comprehension was poor, they obtained a tape recorder. Agent Kellam testified that she had to turn the tape recorder off several times during the interview, because the child was "confused" or to allow Agent Davis, who was asking most of the questions, to collect her thoughts. Agent Kellam testified that she did not know that the child was emotionally or mentally disabled until after the interview.

The Government sought to introduce the interview as evidence to corroborate appellant's confession. In support of its contention that the interview satisfied the residual hearsay rule in that it was reliable, the Government called Dr. James Tom Greene, a clinical psychologist, who had talked with the child about 2 weeks after his interview with the NIS agents. Although Dr. Greene recommended against requiring the child to testify, Dr. Greene did say that, should it be necessary for him to testify, a number of steps could be taken to make the ordeal less traumatic. Dr. Greene also opined that the child had been sexually abused.

Additionally, Dr. Greene offered his opinion on the reliability of the child's statements to the NIS agents. The doctor testified that the child was very emotionally and psychologically disturbed; that he suffered from a learning disability which, in Dr. Greene's opinion, was both "neurologically based" and a result of the sexual

abuse. Dr. Greene stated that he had performed a number of psychological tests on the child and conducted an interview, as stated above, 2 weeks after the boy was interrogated by NIS agents. During their discussion, the child freely told Dr. Greene that he had been made to perform fellatio on his father several times. While the child was not clear about the exact frequency of the acts, he was forthright in stating that they had occurred. He exhibited no ill will towards his father and was, in fact, very concerned that his father could be punished. Dr. Greene stated that, based on his interview with the child and his own experience with other child-sexual-abuse victims, he did not believe the child was fabricating the fact that the sexual abuse occurred. The doctor agreed that it was possible the child was "latching on to" suggestions by the NIS agents as to exact times and frequency of the sexual abuse. He maintained, however, that there was no indication that the boy had fabricated the fact that the abuse occurred or that it had happened frequently, over a long period of time. All of Dr. Greene's testimony was offered in camera to support the admission of the confession and not on the merits. *See United States v. Arruza*, 26 MJ 234, 237 (CMA 1988).

Basing his decision on the child's claimed lack of memory and unwillingness to testify, as well as Dr. Greene's testimony regarding the traumatic effect testifying would have on the child, the military judge ruled that the boy was "unavailable" to testify as a witness at trial. He stated that, "taken as a whole, . . . [the transcript] has substantial equivalent circumstantial guarantees of trustworthiness," under Mil.R.Evid. 803(24) or 804(b)(5), but he did not specify what those guarantees were. The military judge then ruled that appellant's confession could be admitted into evidence

and that the transcript of the child's NIS interview could be admitted to corroborate appellant's admissions. The transcript eventually was offered during the Government's case-in-chief.

There are two separate concerns regarding the military judge's ruling. First, Mil.R.Evid. 304(g)(2) provides that "[t]he military judge alone shall determine when adequate evidence of corroboration has been received." Furthermore:

> [t]he independent evidence [used for corroboration] need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

Mil.R.Evid. 304(g)(1). We are satisfied from the evidence presented at the pretrial in limine hearing that the military judge did not err in finding the confession to be corroborated. *See* Mil.R.Evid. 104(a).

Notwithstanding the fact that the confession was admissible, the question remains as to whether the out-of-court declarations of the child were admissible on the merits.

Appellant does not contend that admission of the NIS interview with S violated his right to confront the witness under the Sixth Amendment to the Constitution

of the United States.[2] Rather, he contends that the statement should not have been admitted because it lacked the "circumstantial guarantees of trustworthiness" required by Mil.R.Evid. 803(24) or 804(b)(5). Based upon the entire record presented to the military judge, including appellant's confession, we are satisfied that the hearsay testimony offered to corroborate appellant's admissions was reliable and admissible under Mil.R.Evid. 804(b)(5).

The record also supports the military judge's ruling that the child was "unavailable" within the meaning of Mil.R.Evid. 804(a)(2) and (3). The judge's ruling, however, was based solely on admissibility of the hearsay evidence and did not infringe upon or restrict appellant's right to confront his accusers. *United States v. Quick*, 26 MJ at 462. Accordingly, we find no error prejudicial to the rights of appellant.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judge SULLIVAN concurs.

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[2]In light of *Coy v. Iowa*, 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), and *Craig v. Maryland*, 493 U.S. 1041, 110 S. Ct. 834, 107 L. Ed. 2d 830 (1990), the Bench and Bar should be forewarned that the correct procedure would have been to put the child on the witness stand in front of the members in order that they might weigh the import of the "unavailability" or the believability of the out-of-court statement.

EVERETT, Chief Judge (dissenting).

The issue before us is admissibility of the transcript of an interview by Naval Investigative Service (NIS) agents of Martindale's adopted son. The military judge and the majority of this Court are of the opinion that the transcript's admissibility was established under Mil.R.Evid. 804(b)(5), Manual for Courts-Martial, United States, 1969 (Revised edition). I disagree.

I

The legislative history of the residual hearsay exception indicates that Congress "intended" the exception to "be used very rarely, and only in exceptional circumstances." S.Rep. No. 1277, 93d Cong., 2d Sess. 20, reprinted in 1974 U.S. Code Cong. & Admin. News 7051, 7066 (emphasis added). The circumstance that the transcript was corroborated by appellant's own confession is not itself "exceptional." *Cf. United States v. Barror*, 23 MJ 370, 372 (CMA 1987); *United States v. Hines*, 23 MJ 125, 137-38 (CMA 1986); *United States v. Bailey*, 581 F.2d 341, 349 (3d Cir.1978). Nor is corroboration determinative of the reliability of the hearsay statement. In Hines, we cautioned: "Corroboration alone, however, without other factors indicating reliability, would generally not suffice to render [hearsay] statements reliable." 23 MJ at 138 n. 17 (emphasis added; citation omitted). In other words, if the ex parte statement is lacking in "circumstantial guarantees of" reliability, the fact that the statement is corroborated by an accused's confession is not enough to satisfy the demands of Mil.R.Evid. 804(b)(5). *See United States v. Barror* and *United States v. Bailey, both supra.*

The majority implies as much when it bases its conclusion "upon the entire record presented to the military judge, including appellant's confession . . ." 30 MJ at 175 (emphasis omitted). The majority does not identify what in the "entire record" it finds so convincing as to the statement's reliability -- but I find the circumstances surrounding the statement to be quite the contrary.

The son was 12 years old; emotionally and mentally disabled; and functionally illiterate. He was under the impression that the agents would not allow his mother to be present with him during the interview; indeed, when his mother asked to remain with her son during the interview, the agents persuaded her not to do so. The record is devoid of any legitimate reason for interviewing an illiterate, emotionally disturbed boy under such conditions.

The interview lasted 2 hours. During the interview, the agents asked the son several questions: They were based on appellant's confession; they were predominantly leading; the son obviously was uncomfortable with them; and almost all were answered by "yes," "no," or "I don't know." Against the backdrop of this style of interrogation (and the questionable reliability of any statement that results), consider two other almost incredible factors: It was not until 30 minutes into the interview, when the agents asked the son to sign a sworn statement, that they learned that he was functionally illiterate; and they did not realize that he was mentally disabled until after the interview was over! Under these circumstances, the risk that the product of this interview is not reliable is so high that it boggles the mind.

To aggravate matters even more (if that is possible), the transcript admitted into evidence is derived from a recorded interview in which, as the NIS agents candidly admitted, there were several intentionally unrecorded gaps (shades of a bygone era). We do not know what was said or done during those intervals -- we are told by the agents, however, that the recorder was turned off at least five times either because the son was confused or to permit the questioner to collect her thoughts! Martindale, of course, had no opportunity to question his son during the interview.

Notwithstanding, the military judge found that, despite the conditions of the interview, the statement evinced "circumstantial guarantees of trustworthiness" "as a whole"; but he failed to explain what those guarantees were or what parts comprised the "whole." Regrettably, the majority opinion suffers from the same omission.

It is possible that the majority relies on the testimony of Dr. Greene "that there was no indication that the boy had fabricated the fact that the abuse occurred or that it had happened frequently, over a long period of time." The majority does concede, though, that the doctor did acknowledge "that it was possible the child was 'latching on to' suggestions by the NIS agents as to exact times and frequency of the sexual abuse." 30 MJ at 175. Why is it possible that the child was led in some of his answers but not in others?

The doctor testified that he had not seen any indication that the fact or duration of abuse had been fabricated by the alleged victim. The question that immediately arises is whether he had any affirmative indication that this information had not been fabricated. In light of the

expert's concession that the child may have "'latch[ed] on to' suggestions by the NIS agents as to" some of the details of his answers and in light of the previously noted comedy of errors surrounding the interrogation, this seems to be a fair question. Strikingly, it is unanswered by the record.

Perhaps even more importantly, the doctor's testimony as to "fabrication" really is testimony as to the credibility of the alleged victim. As was pointed out by Judge Cox in the lead opinion in *United States v. Arruza*, 26 MJ 234, 237 (CMA 1988), *cert. denied*, 489 U.S. 1011, 109 S. Ct. 1120, 103 L. Ed. 2d 183 (1989):

> This Court has consistently held that child-abuse experts are not permitted to opine as to the credibility or believability of victims or other witnesses. *United States v. Petersen*, 24 M.J. 283 (C.M.A. 1987); *United States v. Deland*, 22 M.J. 70 (C.M.A.), *cert. denied*, 479 U.S. 856, 107 S. Ct. 196, 93 L. Ed. 2d 128 (1986); *United States v. Cameron*, 21 M.J. 59 (C.M.A. 1985). This holding is consistent with the decisions of Federal Circuit courts. *See United States v. Azure*, 801 F.2d 336 (8th Cir. 1986).

Although in this case the expert's opinion was presented in the process of determining whether the transcript should be admitted into evidence, the fact remains that it was relied on by the military judge and is now relied on by the majority -- a reliance which, in my opinion, violates the rule established in *Arruza*. In any event, the extraordinarily high risk of unreliability posed

by the circumstances surrounding the questioning quite adequately offsets any assurance that might be drawn from Dr. Greene's testimony.

As the majority opinion notes, the son did testify at the sentencing phase of the trial. However, what occurs after findings of guilt is irrelevant in deciding whether the military judge erred in admitting the transcript into evidence in determining guilt or innocence. Martindale should not be penalized in any way for his decision not to call or confront his son during the trial of the case or to ask during the hearing on the motion in limine whether the transcript contained all of the son's responses during his interview by the two NIS agents. In view of the mental state and illiteracy of this 12-year-old, any failures to obtain complete testimony from him should be held against the Government, rather than against Martindale.

In sum, I conclude that this evidence did not adequately comply with Mil.R.Evid. 804(b)(5), and its reception constituted prejudicial error.

II

Finally, I am concerned because the entire prosecution stems from what seems to me to be a violation of a naval directive designed to protect servicemembers who, like Martindale, have voluntarily sought counseling for a problem. Secretary of the Navy Instruction 1752.3 provides in paragraph 7a for "voluntary self-referral" and states that "disclosure of offenses to designated FAP [Family Advocacy Program] representatives for the express purpose of obtaining treatment or rehabilitation may not be used against the member in any disciplinary

action under the UCMJ or as the basis for characterizing a discharge." (Emphasis added.)

Martindale had referred himself to the Family Advocacy Program; and I conclude that this referral -- even though the result of the conversations with a supervisor -- fell within the category of "voluntary self-referral." Representatives of the Family Advocacy Program, in turn, advised him to disclose his offenses to the Naval Investigative Service. This advice on their part does not seem to comply with the intent of the directive.

When Martindale reported to the Naval Investigative Service, he was given a so-called "cleansing warning," which advised him that "[a]ny statement you have previously made such as to members of your command cannot be used against you." Under the circumstances here, I am convinced that this warning was insufficient to overcome the pervasive effect of the previous advice given to Martindale by his Family Advocacy Program counselor, who suggested that talking to NIS agents about his offenses was necessary as part of his therapy.

It goes without saying that I have no sympathy for the crimes of which Martindale was convicted. However, I am convinced of the importance of Family Advocacy Programs; and it seems to me -- and apparently also to the Secretary of the Navy -- that voluntary self-referral is an important part of such programs. Indeed, voluntary self-referral and prohibitions against disclosure have been incorporated into various other important programs, such as those dealing with alcohol and substance abuse and AIDS.

I conclude that a prohibition against the use of information disclosed "for the express purpose of obtaining treatment or rehabilitation" is a rational -- and probably vital -- component of voluntary self-referral. This being so, I cannot condone the evasion of this privilege which has occurred in the present case and which prejudiced appellant.

III

Since Martindale was convicted on inadmissible -- and unreliable -- evidence, I would reverse the decision below.

APPENDIX E

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 Stovall Street
Alexandria, VA 22332

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

BEFORE

EDWARD M. BYRNE A. F. MIELCZARSKI
J. E. RUBENS

UNITED STATES

v.

RONALD E. MARTINDALE, 430 92 8298
Cryptologic Technician (Collection) Second Class (E-5)
U.S. Navy

NMCM 85 0771 Decided 6 January 1989

Sentence adjudged 19 March 1984. Military Judge: A. Richard Philpott. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Base Pearl Harbor, Box 110, Pearl Harbor, HI 96860-5020.

LT ANTHONY D. DOKURNO, JAGC, USN, Appellate Defense Counsel

LCDR LAWRENCE W. MUSCHAMP, JAGC, USN, Appellate Government Counsel

EDWARD M. BYRNE, A. F. MIELCZARSKI, J. E. RUBENS

PER CURIAM:

Contrary to his pleas, Petty Officer Second Class Martindale was found guilty by a general court-martial in March of 1984 of two specifications of attempted sodomy, one specification of committing indecent acts with a minor, and thirteen specifications of sodomy, in violation of Articles 80, 134, and 125, Uniform Code of Military Justice (UCMJ), respectively.

A panel of this Court, in a lengthy opinion, affirmed the findings of guilty and the sentence in this case. *United States v. Martindale*, No. 85 0771 (NMCMR 30 December 1985).

On September 25, 1986, the United States Court of Military Appeals granted review on the following issue raised by appellate defense counsel:

> Did the Navy-Marine Corps Court of Military Review err in holding that a transcript of the oral unsworn statement of Sean Martindale was properly admitted into evidence?

On March 16, 1987, the United States Court of Military Appeals decided United States v. Barror, 23 M.J. 370 (C.M.A. 1987).

Thereafter, on June 16, 1987, the United States Court of Military Appeals issued the following order:

> On further consideration of the granted issue (23 M.J. 159) in light of *United States v. Barror*, 23 M.J. 370 (C.M.A. 1987), it is ordered that the decision of the United States Navy-Marine Corps Court of Military Review is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to that court for further consideration in accordance with *United States v. Barror*, supra.[1]

Appellant now asserts the following assignment of error before this Court:

> THE TRANSCRIPT OF [S]'S ORAL UNSWORN STATEMENT TO NAVAL INVESTIGATIVE SERVICE AGENTS WAS IMPROPERLY ADMITTED TO EVIDENCE UNDER Mil. R. Evid. 804(A)(3) AND 803(24), DENYING APPELLANT HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AGAINST HIM, WHERE APPELLANT WAS UNABLE TO CROSS-EXAMINE [S] CONTEMPORANEOUSLY WITH HIS PRETRIAL STATEMENT, [S]'S STATEMENT WAS INHERENTLY UNRELIABLE AND THERE WERE NO

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[1] *United States v. Martindale*, 24 M.J. 405 (C.M.A. 1987).

CIRCUMSTANCES SUBSTANTIALLY EQUIVALENT TO EFFECTIVE CROSS-EXAMINATION AT THE INTERVIEW.

In *United States v. Barror*, 23 M.J. 370 (C.M.A. 1987), the United States Court of Military Appeals stated that in *United States v. Hines*, 23 M.J. 125 (C.M.A. 1986), it had concluded that an unavailable witness's pretrial statement, bearing indicia of reliability and circumstantial guarantees of trustworthiness, may be admissible against an accused in lieu of confrontation as an exception to the rule against hearsay only if the circumstances indicated the statement was taken with such a degree of bipartisanship that the purposes of cross-examination were served or if the pretrial statement was confirmed through corroboration. The military judge in our case admitted [S]'s oral unsworn statement as corroboration of the appellant's confession.[2] Consequently, the appellant's own confession confirmed the reliability of [S]'s oral unsworn statement. *See Hines*, 23 M.J. at 137-38 and *Barror*, 23 M.J. at 372. Further, Dr. Greene's testimony reinforced the reliability of [S]'s oral unsworn statement. *See* R. 104-106.

We conclude that [S] was unavailable as a witness on the merits. The defense waived the issuance of an order

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[2]It is noted that one of the trial defense counsel's approaches to this case was to argue that the appellant's statement and his adopted son's statement are so diverse that the appellant could not be proven guilty beyond a reasonable doubt when the two are matched up against each other. (R. 519.) This may have been the reason why the defense did not request an instruction that [S]'s oral unsworn statement was admitted only for the limited purpose of corroborating the appellant's statement. (R. 538.)

to [S] to testify: the only method by which [S] could have been made to testify on the merits. *See* R. 145. We note that [S] did testify for the defense in presentencing. R. 621-22. In any event, we agree with the factual conclusions of the military judge concerning the nonavailability of [S]. R. 260.

We have again examined the record of trial, the clemency petitions, the assignment of error and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. In doing so, we note that we have considered, inter alia, the recent opinions of the United States Court of Military Appeals in *United States v. Yeauger*, 27 M.J. 199 (C.M.A. 1988); *United States v. Guaglione*, 27 M.J. 268 (C.M.A. 1988); and *United States v. Koistinen*, 27 M.J. 279 (C.M.A. 1988). We have considered the appellant's desire to remain in the U.S. Navy. Accordingly, the findings and sentence as approved on review below are affirmed.

APPENDIX F

U.S. COURT OF MILITARY APPEALS

No. 54536/NA

NMCM 85 0771

UNITED STATES, *Appellee,*

v.

Ronald E. Martindale, *Appellant.*

Decided June 16, 1987

APPEAL -- SUMMARY DISPOSITION

On further consideration of the granted issue (23 M.J. 159) in light of *United States v. Barror*, 23 M.J. 370 (C.M.A.1987), it is ordered that the decision of the United States Navy-Marine Corps Court of Military Review is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to that court for further consideration in accordance with *United States v. Barror, supra.*

APPENDIX G

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 Stovall Street
Alexandria, VA 22332

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

BEFORE

JOHN W. KERCHEVAL II MICHAEL D. RAPP
JOHN E. GRANT, JR.

UNITED STATES

v.

RONALD E. MARTINDALE, 430 92 8298
Cryptologic Technician (Collection) Second Class (E-5)
U.S. Navy

NMCM 85 0771 Decided 30 December 1985

Sentence adjudged 19 March 1984. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Base Pearl Harbor, Box 110, Pearl Harbor, Hawaii 96860.

For Appellant: *LCDR ALVIN L. MCDONALD*, JAGC, USN, Appellate Defense Counsel.

For Appellee: *LT J. K. IANNO*, JAGC, USNR, Appellate Government Counsel

PER CURIAM:

Contrary to his pleas, appellant was found guilty at a general court-martial of two specifications of attempted sodomy, one specification of committing indecent acts with a minor, and 13 specifications of sodomy, violations of Articles 80, 134, and 125, Uniform Code of Military Justice (UCMJ), respectively.

Appellant, at the time of trial, was a second class petty officer and had been in the Navy since 1969. Due to a continuing weight problem, he was sent by his command in November 1983 to the obesity program at Long Beach Naval Hospital. While attending that program, appellant disclosed to his counselor during a private session that he had sodomized his adopted son. The counselor, although continuing to assist the appellant, advised him that the Navy's office with cognizance over family advocacy would also have to be informed. Appellant thereafter went to that office in Long Beach for counseling and revealed his misconduct. After appellant returned to his command in Hawaii, he reported in accordance with directions to the Family Advocacy office, and the counselor advised appellant to tell Naval Investigative Service (NIS) of his misconduct. In the company of his wife the appellant then drove to NIS Headquarters, where NIS Agent M advised appellant of his Article 31(b), UCMJ, and counsel rights. After that appellant made a detailed confession to Agent M. Contrary to appellant's claims at trial, the military judge found appellant's statement to NIS voluntary and therefore admissible against appellant.

To corroborate appellant's admissions to NIS, the Government submitted, at trial, the transcript of a tape recorded pretrial statement made by the victim, appellant's adopted son, Sean, to NIS agents. During a deposition and an Article 39(a), UCMJ, session at the pretrial motion stage of appellant's court-martial, however, Sean testified that he did not remember any of the incidents with his father, nor was he sure about what he had told NIS. The military judge, over appellant's objections, held Sean's tape recorded statements admissible under Mil.R.Evid. 803(24). The statements of appellant and Sean comprised the Government's substantive case on the merits at the court-martial.

Appellant comes before us with four assignments of error, which we will address separately:

I

ERROR TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT OCCURRED WHEN THE MILITARY JUDGE RULED THAT APPELLANT'S CONFESSION WAS ADMISSIBLE.

A

VOLUNTARINESS OF THE CONFESSION

Appellant contends, as he did at trial, that his confession was not given voluntarily, because he was under the mistaken assumption that cooperation with NIS was a part of his obesity and Family Advocacy programs and therefore mandatory if he wanted to stay in the Navy. In determining if apellant's statement to NIS was

involuntary, as defined by Mil.R.Evid. 304(c)(3), we must decide if, under "the totality of the circumstances," his statement was given with a free will. *United States v. Murphy*, 18 M.J. 220, 224-27 (C.M.A. 1984). We find that it was. Although appellant, with the encouragement of his counselors and in the absence of warnings, freely discussed sexual misconduct involving Sean with Family Advocacy, none of those discussions were entered into evidence against him, and no promises were made to the appellant that his violations would not lead to criminal actions against him. Further, before interviewing the appellant, NIS Agent M advised him that "any" earlier statements could not be used against him. In addition, Agent M advised appellant that he had the right to remain silent and to speak to a lawyer, and that any statement he did make could be used against him. Appellant then acknowledged his understanding, even producing his own rights card, and chose to waive his rights. Considering these facts along with the appellant's age, technical specialty, and years in the Service, we find that the appellant made his statement to NIS of his own free will, even if his decision to cooperate with NIS was motivated by hope of lenient prosecutorial treatment.

B

CORROBORATION

Appellant next alleges that there was insufficient evidence presented at trial to corroborate his confession. Mil.R.Evid. 304(g) provides, in part, that:

> [a]n admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth.

The Government is not required to present evidence establishing each and every element of the offenses charged, but is only required to establish through sufficient evidence that an accused's statement is trustworthy. *United States v. Schuring*, 16 M.J. 664 (ACMR 1983), *pet. denied*, 17 M.J. 287 (C.M.A. 1984). Sean's recorded statements to NIS agents sufficiently corroborated appellant's confession by various means. Sean was able to articulate the surrounding circumstances and describe with specificity the acts of oral sex he had performed on his father, and he confirmed that these acts occurred many times over the previous four years. Although the exact interval was unclear, Sean stated that his father had asked him to do this at least once or twice a month since he was eight years old; Sean was twelve at the time of his statements. In addition, Sean confirmed several times that he knew what the truth was and that he was, at the time, telling the truth. (*See* Assignment of Error II for further discussion.) The trial court needed no further corroboration.

C

NAVY POLICY

Navy policy states that the disclosure of offenses to Family Advocacy representatives should not be used against a person in a disciplinary action or as the basis for characterizing a discharge. SECNAVINST 1752.3 of 27 January 1984, paragraph 7a(3). Appellant argues that subject instruction is legally applicable regarding his statement to NIS. We disagree. By its terms the instruction would govern only appellant's statements to Family Advocacy counselors and none were presented at trial. Further appellant was advised, prior to confessing to NIS, that those earlier statements absolutely could not be used against him. To hold that the NIS statement was inadmissible due to the above-stated Navy policy would effectively bar the prosecution of anyone reporting to Family Advocacy prior to cooperating with NIS. We find no basis for such a conclusion. Thus, we do not find that the military judge erred in ruling that appellant's confession was admissible, and therefore it was properly admitted.

II

THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING INTO EVIDENCE A TRANSCRIPT OF THE ORAL UNSWORN STATEMENT OF SEAN MARTINDALE.

In admitting Sean's tape recorded statements to NIS agents under Mil.R.Evid 803(24), the military judge specifically found "substantial equivalent circumstantial

guarantees of trustworthiness" therefor. We find, as the military judge did, that the following requirements of Mil.R.Evid. 804(24) were present: (a) adequate notice had been given to appellant and counsel of the proffered evidence; (b) the evidence related to a material fact before the trial court; (c) the evidence was certainly more probative on the point for which it was offered than any other evidence available; and (d) the general purposes of the Rules and the interests of justice were best served by admission of Sean's statement. There is ample evidence of record to show that Sean's statement is trustworthy. Several times during the interview Sean stated that he knew the difference between right and wrong and swore he was telling the truth. The two NIS agents testified concerning the circumstances of the interview, specifically confirming the absence of any coercion, threats or restraint placed on Sean. Although sometimes hesitant in his responses, Sean nevertheless explained the sequence of events coherently, in detail and with an appreciation for the gravity of the proceedings. His age and the absence of apparent disability or motive to fabricate contributed to the trustworthiness of his statement. In addition, Sean's lack of memory at trial does not negate the trustworthiness of his earlier statement. *See United States v. Hines*, 18 M.J. 729 (AFCMR 1984) (victims' refusal to testify at trial); *United States v. Russell*, 712 F.2d 1256 (8th Cir. 1983) (absence of memory of witness). Dr. G, an expert in mental health and child psychology, testified at trial that Sean's responses to psychological testing were indicative of one who had been sexually abused and that Sean's memory lapse between the tape recorded session and later proceedings as a normal reaction of a child who had been sexually abused. Dr. G also testified that he believed that Sean's statements to the NIS agents

were truthful. In the face of such strong evidence, we cannot, as a matter of law, find error in the military judge's ruling admitting Sean's recorded statements, a matter within his sound discretion. *United States v. Whalen*, 15 M.J. 872, 877 (ACMR 1983).

III

A SENTENCE WHICH INCLUDES A DISHONORABLE DISCHARGE AND CONFINEMENT AT HARD LABOR FOR 5 YEARS IS INAPPROPRIATELY SEVERE.

We disagree. We find the sentence more than appropriate for the offenses committed by appellant, considering the sordid nature of the offenses, the lengthy time involved, and the deleterious effect on the victim.

IV

THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT WHEN HE ADMITTED INTO EVIDENCE APPELLANT'S CONFESSION WITHOUT MASKING THOSE PORTIONS WHICH DISCUSSED UNCHARGED MISCONDUCT AND INSTRUCTED THE MEMBERS THAT THEY COULD CONSIDER SUCH FOR THE PURPOSE OF CORROBORATION OF SEAN'S STATEMENT.

As stated by the government counsel at trial, that portion of appellant's statement which referred to prior uncharged misconduct was not being entered for the purposes of proving appellant's guilt or innocence nor was it being entered to show that appellant had acted in conformity therewith. It was intended solely to demonstrate the reliability of Sean's statement. Therefore, Mil.R.Evid. 404(b) and 304(g) have not been violated. Additionally, the military judge gave a clear limiting instruction to the members concerning the portion at issue. We find no merit in appellant's argument that the probative value of this evidence was far outweighed by the prejudice that might have resulted, considering the relative leniency of the adjudged sentence and the seriousness of the charges.

Accordingly, the findings of guilty and the sentence as approved on review below are affirmed.

GRANT, Judge (concurring):

I concur with the majority opinion except as indicated herein.

I

The linchpin consideration in determining whether appellant's confession was involuntary within the meaning of Mil.R. Evid. 304(c)(3) is whether the appellant actually believed that he had to cooperate with Naval Investigative Service (NIS) agents to satisfy the follow up requirements prescribed upon his discharge from the weight program or be administratively discharged from the Naval Service. The appellant cited the after-care plan write up, Defense Exhibits D and E,

which directed that he be seen by Family Advocacy Service (FAS) at his command for follow up counseling, and the insistence of the FAS counselor at his command during follow up counseling that he make a statement to NIS regarding his sodomitical relationship with his adopted son, as evidence that if he did not comply and cooperate with NIS agents, he would have been discharged administratively as a weight-control failure for refusal to participate in the after-care plan. The rub comes into play, however, by virtue of no one officially assigned to the weight-control program or FAS ever suggesting that the after-care plan included a requirement that the appellant cooperate with and provide authorities a statement. The requirement existed ostensibly only in the mind of the appellant. On the contrary the FAS counselor, at the appellant's command, before the appellant proceeded to NIS for purposes of making a statement, advised the appellant that he could be prosecuted for such offenses, but the appellant, notwithstanding such advice, accompanied by his wife, showed up at NIS with a Miranda card in his hand, waived all statutory and constitutional rights, and confessed to the crimes for which he was subsequently found guilty.

Under such circumstances, I believe the appellant cooperated with NIS not out of fear that if he did not, he would be administratively separated from the Naval Service as a weight-control failure. The appellant had much more to lose by making a statement to NIS, namely, prosecution, confinement, and almost certain punitive discharge upon conviction, than he did at an administrative discharge board as a weight-control failure. The only reasonable explanation for appellant's cooperation is that after fully evaluating his options, he

considered prosecution the least desirable scenario, and opted to demonstrate repentance and a potential for rehabilitation by making a statement to NIS as his best chance to either avoid a court-martial or at least to lessen his potential punishment at a court-martial, knowing full well that anything he said could be used against him at a trial by court-martial. His belated attempt to attribute his cooperation with NIS to the fear of being administratively discharged as a weight control failure if he did not, is self-serving and a continuation of his original design to avoid the full impact of his criminal actions.

II

The Government was permitted to introduce, over the appellant's objection, misconduct not charged as part of the appellant's confession to the offenses charged, pertaining to an earlier act of sodomy perpetrated by appellant upon his adopted son and identical in nature to a portion of the offenses charged, and admitted into evidence for the limited purpose of supporting the statement of the adopted son. The net effect was to permit the Government to bootstrap the credibility of the adopted son's statement, which, in turn, was admitted into evidence to corroborate those parts of the appellant's confession regarding misconduct charged. I view this as indirectly condoning that which Mil.R.Evid. 304(g) specifically proscribes, namely, the use of an uncorroborated confession or admission of an accused as independent evidence corroborating the essential facts admitted to in regard to a confession or admission bearing directly upon the offenses charged.

In addressing the impact thereof, I find the inadmissible evidence was harmless beyond a reasonable doubt, where (1) the misconduct not charged occurred long before the misconduct charged; (2) the impact of the misconduct not charged was relatively benign compared to the extensive nature of the remaining portions of the appellant's confession bearing directly upon misconduct charged; (3) other independent evidence corroborated the appellant's confession; (4) no evidence attested to the inherent unreliability of appellant's confession or suggested the confession was obtained through coercion; (5) the trial defense counsel failed to redact the objectionable portions of the confession pertaining to misconduct not charged despite reasonably available solutions, although provided such an opportunity by the trial judge, and (6) the sentence adjudged was relatively lenient given the maximum authorized punishment and the serious nature of the offenses of which the appellant was found guilty.

Accordingly, I join the majority in affirming the findings of guilty and sentence as approved on review below.

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